No. 9196

United States

Circuit Court of Appeals

For the Ninth Circuit.

DANT & RUSSELL, INC., a Corporation,
Appellant,

vs.

GRAYS HARBOR EXPORTATION COMPANY,
a Corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

BAYLEY & CROSON, and
ALLEN H. McCURTAIN,
900-06 Ins. Bldg.,
Seattle, Washington,
Attorneys for Appellant.

McMICKEN, RUPP & SCHWEPPE,
657-71 Colman Bldg.,
Seattle, Washington,
Attorneys for Appellee. [1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 21137

DANT & RUSSELL, INC., a corporation,
Complainant,

vs.

GRAYS HARBOR EXPORTATION COMPANY, INC., a corporation,
Defendant.

COMPLAINT AT LAW.

To the Honorable Judges of the Above Entitled Court:

Complainant, for its First cause of action against the defendant, alleges:

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

Paragraph First.

That the complainant is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, having its principal office and place of business in the State of Oregon, and having for its principal business, the purchase and sale, for export, of lumber and lumber products.

Paragraph Second.

That the defendant is now, and at all times herein mentioned was, a corporation duly organized and existing under [2] and by virtue of the laws of the State of Washington, having its principal office and place of business at Aberdeen, Washington.

Paragraph Third.

That on or about the 1st day of September, 1936, the complainant, as buyer, agreed to buy, and the defendant, as seller, agreed to sell and deliver 500,000 feet, board measure, Brereton Scale, 10% more or less, at seller's option, Pacific Hemlock logs of Camp Run Export Grades, at a price of $14.25 per M feet, Cost & Freight to be paid by seller, for shipment during the month of October, 1936, from Grays Harbor and/or Willapa Harbor in the State of Washington, at seller's option, for shipment to Tsingtau, China, and, on or about the 1st day of September, 1936, in confirmation thereof, the defendant (seller) prepared and forwarded to complainant (buyer), its written contract bearing

Seller's No. S4545, amended, and Buyer's No. CX-532, which confirmatory contract was duly accepted by the complainant (Buyer), and there is attached hereto, and by this reference made a part hereof, a full true and complete copy of said contract, marked Exhibit "A".

Paragraph Fourth.

That defendant shipped, in fulfillment of said contract, by bill of lading dated October 28, 1936, on the MS "Panama", 249,141 feet of logs, of the kind and quality so contracted, for which the complainant paid in the manner and at the time specified in said contract, but, although complainant demanded, and was at all times ready, able and willing to accept, the defendant wholly failed and refused to complete said contract under the terms thereof, but, on or about April 2nd, 1937, the said defendant (seller) offered to complete the same at a price of $16.75 per M feet, and complainant (buyer) on April 3rd, 1937, agreed to accept the balance of the logs due under said contract, provided and condi- [3] tioned that such acceptance should be without prejudice to its contractual rights, and which provisions and conditions were approved by the defendant, on April 8th, 1937, the said defendant submitted, and there was executed, subject to such conditions, a contract, copy of which is attached hereto, marked Exhibit "B", and by this reference made a part hereof, under which said conditional contract, the defendant shipped,

under bill of lading, dated May 24th, 1937, on the MS "Nordpol" 253,751 feet Brereton Scale logs for which complainant was obliged to, and did pay the defendant, the rate of $16.75 per M feet.

Paragraph Fifth.

That because of the wrongful failure and refusal of defendant to ship the logs covered by the contract herein designated as Exhibit "A", the complainant was and is damaged in the sum of $2.50 per M feet, on 253,751 feet of logs, amounting to $634.38.

And complainant, for its Second cause of action against the defendant, alleges:

Paragraph First.

The complainant re-alleges, and by this reference, makes a part hereof, all and singular, the allegations contained in Paragraphs "First" and "Second" of its first cause of action herein stated.

Paragraph Second.

That on or about the 4th day of September, 1936, the complainant, as buyer, agreed to buy, and the defendant, as seller, agreed to sell and deliver 1,000,000 feet, board measure, Brereton Scale, 10% more or less, at seller's option, Pacific Hemlock logs of Camp Run Export Grades, at a price of $13.75 per M. [4] feet, Brereton Scale, Cost & Freight to be paid by seller, for shipment 500,000

feet, October/November of 1936, and 500,000 feet November/December of 1936, at seller's option, for shipment from Grays Harbor and/or Willapa Harbor in the State of Washington, at seller's option, for shipment to Shanghai, China, and, on or about the 4th day of September, 1936, the defendant (seller), in confirmation thereof, prepared and forwarded to complainant (buyer), its written contract, bearing seller's No. S4566. buyer's No. CX-510, which confirmatory contract was duly accepted by complainant (Buyer), and there is attached hereto, and by this reference made a part hereof, a full, true and complete copy of said contract, marked Exhibit "C".

Paragraph Third.

That defendant shipped in fulfillment of said contract, by bill of lading dated October 5, 1936, on the MS "Pleasantville," 502,635 feet, Brereton Scale logs, for which complainant paid in the manner and at the time specified in said contract, and, although complainant demanded, and was at all times prepared to accept, the defendant wholly failed and refused to complete said contract under the terms thereof.

Paragraph Fourth.

That by reason of the defendant's refusal to so perform said contract, and by reason of the commitments made by the complainant, in reliance upon said contract, the complainant was obliged to, and

did purchase, at the best price obtainable, and in open market, 430,084 feet, Brereton Scale, of logs of the kind and quality covered by said contract, and for the account of the defendant, at a cost of $6.25 per M feet, and at a freight cost of $20.00 per M feet, or a total of $26.25 per M feet, and shipped to Shanghai, China, on the SS "Michigan", said logs at a loss of [5] $12.50 per M feet, or a total of $5,376.05, which said loss and damage was suffered and sustained by the complainant, solely as a result of the refusal of the defendant to comply with said contract.

And complainant, for its Third cause of action against the defendant, alleges:

Paragraph First.

The complainant re-alleges, and by this reference, makes a part hereof, all and singular, the allegations contained in Paragraphs "First" and "Second" of its first cause of action herein stated.

Paragraph Second.

That on or about the 28th day of September, 1936, the complainant, as buyer, agreed to buy, and the defendant, as seller, agreed to sell and deliver, 1,700,000 feet, board measure, Brereton Scale, 10% more or less, at seller's option, Pacific Hemlock Logs, of Camp Run Export Grades, at a price of $14.00 per M feet, Cost & Freight to be paid by seller, for shipment from Grays Harbor and/or

Willapa Harbor in the State of Washington, at seller's option, for shipment to Shanghai, China, and for shipment 200,000 feet October/November, 1936, at seller's option, 500,000 feet December, 1936, 500,000 feet January 1937, and 500,000 feet February, 1937, and on or about the 28th. day of September, 1936, in confirmation thereof, the defendant (seller) prepared and forwarded to complainant (buyer), four separate written contracts covering said purchase and sale, being numbered by seller, S4609#1, S4609#2, S4609#3, and S4609#4, and being numbered by buyer, CX-550, CX-547, CX-548, and CX-549, which confirmatory contracts were duly accepted and there is attached hereto, and by this reference made a part hereof, copy of said confirmatory contract, seller's No. 4609#1, [6] buyer's No. CX-550, marked Exhibit "D", and complainant alleges that contracts designated seller's No. S4609#2, S4609#3 and S4609#4, are in all respects identical with said Exhibit "D", except that S4609#2 called for shipment of 500,000 feet in December; No. S4609#3 called for shipment of 500,000 feet in January, 1937, and S4609#4 called for shipment of 500,000 feet in February, 1937.

Paragraph Third.

That defendant shipped in fulfillment of said contract by bill of lading dated October 28, 1936, on the MS "Panama", 170,384 feet, Brereton Scale, from Willapa Harbor, and on March 4th, 1937, on the MS "Grandville," from Grays Harbor, Washing-

ton, 494,176 feet, Brereton Scale, logs, or a total of logs shipped under said contract, aggregating 664,560 feet of logs, Brereton Scale, for which complainant paid in the manner and at the time specified in said contract, and, although complainant demanded, and was at all times prepared to accept, the defendant wholly failed and refused to complete said contract under the terms thereof.

Paragraph Fourth.

That by reason of defendant's refusal to so perform said contract, and by reason of the commitments made by the complainant, in reliance upon said contract, the complainant was obliged to, and did purchase, at the best price obtainable, and in open market, 919,325 feet, Brereton Scale, of logs of the kind and quality covered by said contract, and for the account of the defendant, at a cost of $6.25 per M feet, and at a freight cost of $20.00 per M feet, or a total of $26.25 per M feet, and shipped to Shanghai, China, on the SS "Michigan", from Willapa Harbor, said logs at a loss of $12.26 per M feet, or a total of $11,261.74 which said loss and damage was suffered and sustained by the com- [7] plainant, solely as a result of the refusal of the defendant to comply with said contract;

Wherefore, complainant prays for judgment against the defendant, for the sum of $634.38 on its first cause of action; for the sum of $5,376.05 on its second cause of action; and for the sum of $11,-261.74 on its third cause of action, or, for a total

of $17,272.17, and for its costs and disbursements herein incurred.

BAYLEY & CROSON
Seattle, Washington
ALLEN H. McCURTAIN
Portland, Oregon
Attorneys for Complainant.

State of Oregon,
County of Multnomah—ss:

I, R. J. Darling, being first duly sworn, say that I am Vice-President of Dant & Russell, Inc., complainant named in the foregoing Complaint at Law; that I have read the said complaint, and am acquainted with the facts therein stated, and that the same are true as I verily believe.

R. J. DARLING.

Subscribed and sworn to before me this 16th day of July, 1937.

[Seal] ALLEN H. McCURTAIN
Notary Public for Oregon.

My Commission Expires: Aug. 24, 1940.

[Endorsed]: Filed Jul. 29, 1937. [8]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above entitled action, and for answer to complainant's complaint herein, admits, denies and alleges as follows:

I.

Answering Paragraph First of the first cause of action in said complaint, the defendant admits the same.

II.

Answering Paragraph Second of the first cause of action in said complaint, defendant admits the same.

III.

Answering Paragraph Third of the first cause of action in said complaint, the defendant admits the execution of Exhibit "A" attached to the complaint, being written contract bearing seller's number S4545, amended, and buyer's number CX-532, but denies each and every other allegation contained in said paragraph.

IV.

Answering Paragraph Fourth of the first cause of [9] action in said complaint, defendant admits that the defendant shipped by bill of lading dated October 28, 1936, on the MS "Panama" 249,141′ of logs, of the kind and quality so contracted, for which the complainant paid in the manner and at the time specified in said contract; admits that Exhibit "B" attached to the complainant's complaint was executed on the date therein specified, said Exhibit "B" being seller's number 8873, buyer's number CX-532; admits that defendant shipped, under bill of lading dated May 24, 1937, on the MS "Nordpol" 253,751 feet of logs, and that the complainant paid the defendant therefor at the rate of

$16.75 per M feet; but defendant denies each and every other allegation contained in said paragraph.

V.

Answering Paragraph Fifth of the first cause of action in said complaint, the defendant denies each and every allegation therein contained, and particularly denies that the complainant was and is damaged in the sum of $634.38, or in any sum whatsoever.

For answer to the second cause of action alleged in complainant's complaint, the defendant admits, denies and alleges as follows:

I.

Answering Paragraph First of the second cause of action in said complaint, the defendant admits the same.

II.

Answering Paragraph Second of the second cause of action in said complaint, the defendant admits the execution of Exhibit "C" to the said complaint, being seller's number S4566, buyer's number CX-510, but denies each and every other allegation contained in said paragraph. [10]

III.

Answering Paragraph Third of the second cause of action in said complaint, defendant admits that defendant shipped by bill of lading dated October 5, 1936, on the MS "Pleasantville" 502,625′, Brereton Scale, of logs for which complainant paid in the

manner and at the time specified in said contract; but denies each and every other allegation contained in said paragraph.

IV.

Answering Paragraph Fourth of the second cause of action in said complaint, defendant denies that it has any knowledge or information thereof sufficient to form a belief, and particularly denies that the complainants suffered a loss of $5,376.05 or any other sum whatsoever.

For answer to the third cause of action alleged in complainant's complaint, the defendant admits, denies and alleges as follows:

I.

Answering Paragraph First of the third cause of action in said complaint, defendant admits the same.

II.

Answering Paragraph Second of the third cause of action in said complaint, defendant admits the execution of Exhibit "D" attached to said complaint, being seller's number S4609#1, buyer's number CX-550, and also admits the execution of seller's number S4609#2, S4609#3 and S4609#4, and admits that said last three designated contracts are in all respects identical with said Exhibit "D" except that S4609#2 called for shipment of 500,000′ in December, 1936, number S4609#3 called for shipment of 500,000′ in January, 1937, and S4609#4 called for shipment of 500,000′ in February, 1937.

[11]

III.

Answering Paragraph Third of the third cause of action in said complaint, defendant admits that defendant shipped, by bill of lading dated October 26, 1936, on the MS "Panama" 170,384′, Brereton Scale, from Willapa Harbor, in fulfillment of said contract attached to the complaint as Exhibit "D" and identified as seller's number S4609#1, buyer's number CX-550; that on March 4, 1937, defendant shipped on the MS "Granville" from Grays Harbor, Washington, 494,176′, Brereton Scale, logs, in fulfillment of contract identified as seller's number S4609#4, buyer's number CX-549, and that complainant paid for said shipments in the manner and at the time specified in said contract; but denies each and every other allegation contained in said paragraph.

IV.

Answering Paragraph Fourth of the third cause of action in said complaint, defendant denies that it has any knowledge or information thereof sufficient to form a belief, and particularly denies that the complainant was damaged in the sum of $11,-261.74, or in any other sum whatsoever.

And for its First Affirmative Defense to the First, Second and Third causes of action alleged in the complaint, and each of them, defendant alleges that a strike of longshoremen in all seaport towns of the Pacific Coast of the United States of America, including Grays Harbor and Willapa Harbor, Washington, commenced on or about the

28th day of October, 1936, and continued without interruption from said date up to and including the 5th day of February, 1937, and that, by reason of said strike, it was impossible for any person, including the defendant, to move any cargo during [12] said time from Grays Harbor or Willapa Harbor, Washington; and that, by reason of said strike, it was impossible for the defendant to ship or deliver, during the period of shipment agreed upon in said contracts, any of the lumber remaining undelivered under any of the contracts sued upon in said first, second and third causes of action, or any of them; that all of the contracts mentioned in the complainant's three causes of action provided that the defendant should not be liable for nonshipment or nondelivery occasioned by strikes or labor disturbances, and that, by reason of such provisions contained in said contracts, defendant is not liable to complainant for nonshipment or nondelivery of any of the lumber which complainant in its three causes of action alleges was not shipped or delivered.

Wherefore, having fully answered, the defendant prays that the complainant take nothing by its action, and that defendant do have and recover its costs and disbursements herein.

McMICKEN, RUPP &
SCHWEPPE
Attorneys for Defendant. [13]

United States of America,
Western District of Washington,
County of King—ss:

J. P. Herber, being first duly sworn, on oath deposes and says: That he is the General Manager of Grays Harbor Exportation Company, Inc., a corporation, the defendant in the above-entitled action, and makes this verification for and on behalf of said defendant, being duly authorized so to do; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

J. P. HERBER.

Subscribed and sworn to before me this 20th day of August, 1937.

[Notarial Seal] JOSEF DIAMOND
Notary Public in and for the State of Washington, residing at Seattle.

Copy Received Aug. 20, 1937.

BAYLEY & CROSSON.

[Endorsed]: Filed Aug. 31, 1937. [14]

[Title of District Court and Cause.]

DEMURRER

Comes now the complainant in the above entitled action, and demurs to the first affirmative defense set out in the defendant's answer, and to each and every part thereof, on the ground that the same

does not set forth facts sufficient to constitute a defense to the complainant's action.

Dated this 17th day of September, 1937.

By its attorneys
A. H. McCURTAIN
BAYLEY & CROSON.

Copy Received Sept. 18, 1937.
McMICKEN, RUPP &
SCHWEPPE
Attorneys for Defendant.

[Endorsed]: Filed Sep. 24, 1937. [15]

[Title of District Court and Cause.]

ORDER OVERRULING DEMURRER.

The above entitled cause having come on for hearing upon the demurrer of the complainant to the first affirmative defense set out in defendant's answer, and to each and every part thereof, on the ground that the same does not set forth facts sufficient to constitute a defense to the complainant's action, the complainant appearing by Bayley & Croson and Allen H. McCurtain, its attorneys, and the defendant appearing by McMicken, Rupp & Schweppe, its attorneys, and oral argument having been had thereon and written briefs having been filed on behalf of both parties, and the court being fully advised in the premises;

It is now by the court hereby Ordered that complainant's said demurrer to said first affirmative defense set out in defendant's answer be and the same hereby is overruled, to which order the complainant excepts and such exception is hereby allowed.

Done in Open Court this 23rd day of March, 1938.

JOHN C. BOWEN
United States District Judge.

Approved as to form:

BAYLEY & CROSON
Attorneys for Complainant.

Presented by:

J. GORDON GOSE

[Endorsed]: Filed Mar. 23, 1938. [16]

[Title of District Court and Cause.]

REPLY TO FIRST AFFIRMATIVE DEFENSE.

Comes now the complainant in the above entitled action, and for reply to the first affirmative defense pleaded by defendant's answer, admits, denies and alleges as follows:

I.

Admits that a strike of longshoremen in all seaport towns on the Pacific Coast of the United States of America, including Grays Harbor and Willapa Harbor, Washington, commenced on or

about the 28th day of October, 1936; denies that the said strike continued without interruption up to and including the 5th day of February, 1937, and, in that behalf, alleges that said strike ended February 4th, 1937; denies that it was impossible for defendant to ship or deliver, during the period of shipment agreed upon in said contracts, the logs remaining undelivered under all of said contracts sued upon in the first, second and third causes of action, and, in that behalf alleges that the defendant could have shipped all unfilled balances of the contracts between the parties, within 30 days after the cessation of said strike, and within the time limited by said contracts, for delivery thereunder; denies that the said contracts provide that [17] the defendant should not be liable for non-shipment, or non-delivery if occasioned by strikes or labor disturbances, or that by reason of such or any of such provisions contained in said contract, defendant is not liable to complainant for non-shipment or non-delivery of any or all of the logs alleged by the complaint to have been due for shipment by the defendant.

And, for a first affirmative reply to said affirmative defense, complainant alleges:

I.

That it was the understanding and agreement of the parties, complainant and defendant, both by oral negotiations leading up to, and by the terms of the, contracts pleaded, that the defendant would

be obliged to ship, all logs called for by the several contracts between the parties, within a reasonable time after, and that the complainant would be obliged to accept shipment within 30 days after, the cessation of any strike which interrupted the prompt fulfillment of said contracts, and, in this connection, alleges that the defendant could have shipped all of said logs remaining unshipped under said contracts, within 30 days, or within a reasonable time from and after the cessation of the strike before mentioned, and that complainant was at all times, prior to the filing of the complaint herein, ready, able and willing to accept delivery of the items un-delivered under the contracts in controversy.

And, for a second affirmative reply to said affirmative defense, complainant alleges:

I.

That it is the custom and usage of the lumber and ex- [18] port trade on the Pacific Coast of the United States of America, that clauses similar to the clauses contained in the contracts between the parties, complainant and defendant, are construed to mean that, in the event of delay in a shipment of logs to foreign ports from any port on the Pacific Coast of the United States, caused by a strike of any nature, that the seller is obligated to ship, at the option of the purchaser, as soon after cessation of the strike as is reasonably possible, and, in this connection alleges that it was within the power of

the defendant to have shipped all of the logs to complainant, in fulfillment of the contracts pleaded, within a reasonable time from and after the cessation of the strike referred to, and within 30 days after cessation of the same, and that, under such usage and trade custom the defendant was liable to ship the balance of said orders, and is liable to the complainant for damage occasioned by its failure to do so.

And for a third affirmative reply to said affirmative defense, complainant alleges:

I.

That subsequent to the cessation of the strike pleaded in defendant's affirmative defense, the defendant did ship various quantities of logs under said contracts to complainant's order, and in fulfillment of said contracts, and as late as May 24, 1937; that by such shipments, the said defendant construed the said contracts to compel delivery on behalf of the defendant subsequent to the cessation of the strike pleaded by defendant, and by such construction, the defendant ratified and approved its liability to make said shipments and all of them, and that defendant ought to be, and is estopped from now contending for or asserting any other or different construction of said contracts, [19] than a construction which renders the defendant liable in damages for its failure to have completed deliveries in accordance with said contracts, as understood by and construed between the parties.

Wherefore, the complainant, having fully replied, prays judgment as in its complaint prayed for.

BAYLEY & CROSON
ALLEN H. McCURTAIN
Attorneys for Complainant.

State of Oregon,
County of Multnomah—ss:

I, R. J. Darling, being first duly sworn, say that I am Vice-President of Dant & Russell, Inc., complainant named in the foregoing reply; that I have read the said reply, and am acquainted with the facts therein stated, and the same are true as I verily believe.

R. J. DARLING.

Subscribed and sworn to before me this 2nd day of April, 1938.

[Seal] ANGELINE KRIARA
Notary Public for Oregon.

My Commission Expires: 6/28/41.

Copy Received 4/4/38.

McMICKEN, RUPP &
SCHWEPPE
Attorneys for Deft.

[Endorsed]: Filed Apr. 5, 1938. [20]

[Title of District Court and Cause.]

TRANSCRIPT OF TESTIMONY

[21]

Be It Remembered that heretofore and on to wit the 4th day of October, 1938, the above entitled cause came regularly on for trial in the above court before the Honorable John C. Bowen, one of the judges of said court;

The plaintiff appearing by Frank S. Bayley, Esq., of Messrs. Bayley and Croson, and Allen H. McCurtain, Esq.

The defendant appearing by Alfred J. Schweppe, Esq. and J. Gordon Gose, Esq. of Messrs. McMicken, Rupp and Schweppe.

The case being tried before the court without a jury.

Thereupon the following proceedings were had and done, to wit: [24]

The Court: Are the parties and counsel ready to proceed with the trial of the case of Dant & Russell against Grays Harbor Exportation Company?

Mr. Schweppe: Defendant is ready, Your Honor.

The Court: You may proceed.

Mr. McCurtain: If Your Honor please, I suppose it is not fair to assume that Your Honor remembers after a period of months everything that——

The Court: (interposing) You may assume that I have remembered nothing. I have reviewed a good deal of this file, but you can just proceed as if I had not heard anything about it.

Mr. McCurtain: The case hinges upon the construction of a series of contracts entered into between Dant & Russell, the complainant here, and the defendant Grays Harbor Exportation Company, involving the shipment of hemlock logs to the Orient. The first contract which is in dispute was executed on September 1, 1936, and which provided for the sale and delivery of 500,000 feet to Tsingtau, China, delivery to be made cost and freight, at Willapa or Grays Harbor, seller's option, the defendant in this case, Your Honor, being the seller.

Of that order, apparently 250,000 feet were shipped at a date prior to October 28, 1936, at which time occurred a maritime strike, a longshoremen's strike, which prevented the defendant from completing that shipment which called for October delivery to the boat, leaving unfilled approximately a quarter of a million feet on that first order.

On September 4, a contract in all respects identi- [25] cal as to terms was entered into providing for the shipment of a million feet, October and November 500,000, and 500,000 November and December, seller's option. The price on this second lot was $13.75 per thousand, and on the first lot $14.25.

Of this second contract, approximately one-half was shipped prior to the strike which occurred, prior to October 28, and no more.

On September 28 a contract was negotiated which may or may not be construed by Your Honor to be

one contract. The fact is that negotiations leading up to these contracts or contract called for the purchase and sale of 1,700,000 feet; and the buyer, the plaintiff here, specified deliveries on four separate orders of 200,000 to Shanghai, October-November, and of that shipment approximately 170,000 feet was shipped, and no further claim is made concerning that. As to the other three portions of this order, what the defendant called his number 4609, numbers 2, 3, and 4, the plaintiff's numbers CX547, 548 and 549, called for delivery December, 500,000, on which no delivery was made; January, 500,000, on which no delivery was made; and February, 500,000, of which approximately 500,000 was shipped as of, I think the loading date on the boat was March 4 as I recall it, March 3 or 4. The date is immaterial, Your Honor, because the shipment, whether we concede the strike to have been ended as of February 4 or February 5, it was still within the thirty day clause which is one of the subjects or one of the points of controversy in the case; so we make no point of that. [26]

Our pleading says that the strike ended on the 4th day of February. Mr. Schweppe's pleading says on the 5th, but it is immaterial to the case in any event, Your Honor, because this last mentioned shipment of approximately 500,000 in March was within the thirty days, whether the strike be considered to have ended on the 4th or the 5th. So that question of the date is a moot question so far as Your Honor is concerned.

Now, on October 7, a few days after this last series of contracts, identical contracts were entered into between the parties calling for the delivery of a hundred thousand board measure to Hong Kong at $19.00 per thousand. That was split into two orders so far as the plaintiff is concerned, our number C2813 and S2814, that combined in one contract under the defendant's number 4624. The contract called for the delivery of 50,000 feet October, 1936 and 50,000 feet December, 1936.

On October 19, some twelve days later, still a further contract was entered into between the parties which bears the plaintiff's number 2858 and the defendant's S4647, calling for the shipment of 50,000 feet board measure to Hong Kong in the first half of November, 1936.

Now, these last three mentioned contracts are called to Your Honor's attention because of the fact that these, together with all the other contracts, were made on a prined form which has been in general use I believe the evidence will show by the plaintiff for many years, and is in common use with other heavy shippers [27] in this community.

We claim first that the clause in the contract providing for strikes, and providing that the contracts are made subject to strikes, is a delivery clause and not a frustration clause; and we claim that the defendant was bound to ship within a reasonable time after the cessation of the strike, or any other impediment mentioned in the general clause; and we cite these last three mentioned cases to show Your

Honor that the defendant itself, by its own construction of the language of the contract, felt itself obligated to and fulfilled its obligations in March of 1937 to ship three various parcels which its written and printed contracts called for shipment concerning, 50,000 in October, 50,000 in December and 50,000 in the first half of November.

So that by the shipment without any question made or any correspondence concerning or any discussion concerning, the acceptance by the plaintiff of those delayed shipments, placed a construction on these contracts by the defendant which is unanswerable and is controlling in this case.

The strike, as I have stated, occurred October 28; and for the purpose of discussion let us say ended February 5.

After that date, that is to say after February 5, Mr. Connolly, who will be a witness here and who is the Seattle representative of the plaintiff corporation, had a number of conferences with the principal officers of the defendant, at no one of which did the defendant ever make any question about the shipment of all of the mer- [28] chandise called for by these several contracts; but there was considerable discussion as to when the defendant would be able to get vessels to carry the cargoes abroad under the contract.

That situation continued until the 24th of February, at which time the defendant wrote the plaintiff a letter, and while mentioning no cancellation at all, advised the plaintiff that the order which bears

the defendant's number 549, number 4, and which is the February shipment under the contract sued on, together with these other three contracts which I have mentioned as having been made October 7 and 19, were on the line for delivery; and in that letter, made no reference to the acceptance by the plaintiff of these delayed shipments, and again construed all of the contracts, they being all identical so far as the controversial portions of the contract are concerned, as obligating the defendant to ship and the plaintiff to receive; and we so construed it.

After the shipment which they call the February shipment, being their number 4609 number 4, was on the vessel, and ladings had been issued, and bills tendered to us, at that time and then for the first time by letter dated March 6 the defendant took the position that an increase in freight rate of eighty-seven and a half cents on the Shanghai shipments was for the account of the plaintiff. The plaintiff refusing to recognize that construction answered that letter on March 8, and stated that under no circumstances would they assume an additional price; but reminding the defendant of its obligation to ship according to the contract, and as soon as [29] possible after the cessation of the strike.

That date of March 6, Your Honor, which is approximately a month after the end of the strike, was the first notice of any kind that this defendant ever gave to the plaintiff either orally or in writing of any controversy under the contracts whatsoever, and they failed wholly to answer a letter of Febru-

ary 25 concerning these matters in which the plaintiff asked the defendant as to when the former orders numbers C510 or 532 would be shipped. That letter was never answered by the defendant at all. Nor did that letter of March 6 requesting additional freight from the plaintiff answer the letter concerning the previous shipments.

But after March 6, or March 8, the plaintiff's agent Connolly, in conversation with Mr. Herber, the defendant's principal officer, raised some question as to whether they were liable, which resulted in a conference being held in this city on the 18th day of March, attended by myself as attorney for the plaintiff, Mr. Dant of my client firm, Mr. Connolly, Mr. Herber of the defendant firm, and Mr. Schweppe.

At that conference there was produced a copy of a letter dated January 8 addressed to the plaintiff and to be signed by the defendant, but which it is admitted was never forwarded; and March 18 was the first notice of any formal character we had whatsoever that the defendant would claim that the clause in controversy here excused them altogether from performance.

After March 18 there was nothing occurred between the parties which has to do with the controversial [30] question; and I think Mr. Schweppe, counsel for the defendant, will make no question but that the plaintiff did everything within its power to assist the defendant in reducing damages. There will be correspondence offered to complete

the picture before Your Honor showing that the plaintiff offered space to the defendant on certain contract vessels which it could control, and offered to furnish logs at a lesser price than the defendant might have been able to obtain them. At any rate we purchased approximately a million and a half feet to cover the orders which bear their numbers 4609, 2 and 3, and their number 4566, our number 510, which were the November-December shipments on the one contract, and the December-January shipments on the other, at a damage to the plaintiff of approximately sixteen thousand some hundred dollars.

There was still another order, CX532, which was for delivery in October and a portion only of which had been shipped. When that question of buying that lot came up, the defendant said that he had and could ship conveniently I believe on the same March 4 boat as I recall it, that quarter of a million, at a price of $2.50 increase, to which the plaintiff replied that we would not pay the $2.50 increase; but inasmuch as it was a comparatively small matter, for the accommodation of all parties, we would pay the additional $2.50, reserving our rights. That was handled by a letter, and a letter from the defendant agreeing thereto puts in controversy a matter of some $634.00 difference there, which was paid by the plaintiff under a reservation of rights. [31]

Now, the contention of the plaintiff, as made on the demurrer to the further answer, of course is

that this clause upon which they place so much stress is not a frustration clause, but is a clause which was intended to cover a situation which the parties fully expected and fully anticipated meeting, that in all shipping contracts similar clauses are generally inserted; and we will offer to show to Your Honor by competent evidence of men who have been years and years in the business, in the exporting business, here and in Tacoma and up and down the coast generally, that it is the universal and unvarying custom and usage in the trade to treat all such clauses as delay clauses only, and to treat all such clauses as obligating the seller to complete such a contract within a reasonable time after the cessation of the impediment, whatever that may be, whether war, fire, strike, drought, or what not.

We also will contend, as I have already told Your Honor, that—by the way, I should interrupt my general statement to say that to the answer filed setting up this strike clause, we pleaded not only the custom, but that the parties had placed a construction on the contract which we think is controlling upon the court, and which will be proved by the oral conversations as well as the shipment of these other items under the same contract.

We believe we can show also, Your Honor, that the defendant has under the same printed form contract shipped to other purchasers at the old contract price.

I think that fairly states the plaintiff's position in connection with the matter. Mr. Schweppe has

been very [32] kind, and we have gone over the correspondence; and I think we are agreed, Mr. Schweppe, that you have the letter which we wrote you that we called for. I think we will have before Your Honor a complete file of the letters passing between the parties which can be introduced without any question, and we also have here the freight bills which we paid, and the bills we paid with checks evidencing their payment, for the merchandise which was purchased to fill the orders as we claim under their obligation, and as they claim for our own account.

There will be no question as I understand it, Mr. Schweppe—and I am certain there is none on our part—as to the exact dollars and cents involved in the case, nor do they question according to Mr. Schweppe's statement to me that we paid a reasonable price and got as low a freight rate as could be had. So there is no question of the damage involved.

Mr. Schweppe: May it please the court, I will take a few moments to outline the case from the viewpoint of the defendant.

The Court: Before you start to do that, may it be agreed between the parties that the parties will supply the court with a transcript of these proceedings as made from the reporter's notes now being taken by the reporter upon attendance at the trial, and that the cost thereof may be taxed in the case?

Mr. Schweppe: It is entirely agreeable to us.

Mr. McCurtain: It will be entirely agreeable to us, and I assume the practice is that there will be

a copy of that transcript furnished to counsel on either [33] side, or on both sides?

The Court: You can arrange that privately.

Mr. Schweppe: With the reporter, yes.

Mr. McCurtain: I have no objection, Mr. Schweppe, if you agree that those copies be taxed as costs.

Mr. Schweppe: All right; the reporter, instead of making two, will make three, and give one to the court and one to each of the parties.

Mr. McCurtain: And that may be taxed as costs.

Mr. Schweppe: Briefly the case is this, if the court please. In the month of September, 1936, six contracts were negotiated between the plaintiff and the defendant for the shipment of lumber to the Orient. These contracts were all negotiated on the identical contract of sale form which the defendant customarily uses in its business.

These contracts called for the shipment of lumber in different lots, 250,000 feet, 500,000 feet, and so on; and each of these contracts fixed a particular time of shipment.

For instance, if Your Honor will examine the exhibits to the complaint, which are all admitted as being the contracts between the parties, you will note for example that there was a contract for the shipment of 500,000 feet in the month of November; that there was a contract for the shipment of 500,000 feet in January; there was one contract for the shipment of a certain quantity in November or December, seller's option, that is, the seller's option

as to whether it should be shipped in November or December. [34]

Each of these contracts of sale, as shown right on their face, and as counsel for the plaintiff has stated, were made on the basis of cost and freight, or contract and freight as these contracts are sometimes known in the mercantile field. In other words the seller, the defendant here, when it sold lumber to Dant & Russell, the plaintiff here, gave one lump sum price which included the cost of the lumber and the cost of the freight to the Orient.

In other words the seller not only sold the merchandise, but also provided the carriage, made a contract of carriage, and the cost of the freight was included in the contract.

Now, it is admitted here without any question that there was a strike of longshoremen which dated from October 29 to February 4 or 5, 1937. There isn't any argument between the parties, and it is agreed between us that it was impossible to make shipment during that period. Am I right in that?

Mr. McCurtain: Yes.

Mr. Schweppe: It was impossible to make any shipment under these contracts from the 29th day of October until the 5th day of February, 1937, by reason of the prevalence of the strike.

These contracts of shipment, all on the identical form, contained what is commonly known or commonly described as a force majeure clause. That is a clause protecting the seller against liability in shipment in the event certain conditions happen,

such as strikes, lockouts, labor disturbances and the like; and the clause in this [35] particular contract—and in my judgment the construction of this clause is determinative of this controversy; it is a question of law as I see it—reads as follows: "The seller is not liable for delay or non-shipment, or for delay or non-delivery, if occasioned by strikes, lockouts or labor disturbances. Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned clauses if so required by the seller, provided the delay does not exceed thirty days."

Let's picture this contract again. It is a contract that calls for the delivery of 500,000 feet in the month of November. The contract period of shipment specified by the parties is the month of November. The contract provides in this clause that the seller shall not be liable for non-shipment or non-delivery within the contract period. It is further provided that the seller may call on the buyer to accept shipment within thirty days thereafter, but that clause obviously is one that is for the benefit of the seller, because it provides "if so required by the seller."

Now, all of the facts relating to these contracts of sale were set up in the complaint, to which the defendant filed an answer in which we briefly set up the fact that between the dates of October 29, 1936 and February 5, 1937 there was a strike of longshoremen in all Pacific Coast ports, and that it was impossible to make delivery during the contract

period of shipment agreed on by the parties on most of these contracts.

It is shown by the record that any deliveries that still had to be made under the contracts after the strike [36] expired were made.

To this answer of ours, setting up the strike—which it is our position permanently excused delivery, because the contract period of delivery expired—the plaintiff filed a demurrer. That demurrer was argued before Your Honor a number of months ago. I think four briefs were filed, two by the plaintiff and two by the defendant; and Your Honor resolved that question by overruling the demurrer to the affirmative defense, holding it at least preliminarily to be a good defense against the cause of action claimed in the complaint, in which the complainant claims that they have suffered damage to the extent of about $17,000.

Now, after Your Honor overruled the demurrer to the answer, in which we set up that the condition had happened which was provided for in the contract, namely, the strike, and that the strike had prevented deliveries from being made during the contract period of shipment, and that therefore delivery was permanently excused, the plaintiff filed a reply; and in their reply they set up certain affirmative matter which is really the only new matter of any character that is presented to Your Honor in this controversy in addition to what was presented at the time of the demurrer, and that new matter consists briefly of this: I think in their first reply

to our affirmative defense they set up that there was an oral negotiation leading up to the making of the written contracts; that in the event a strike occurred the defendant would make delivery within a reasonable time after the strike ceased, although the period of delivery specified [37] by the parties had long since expired.

Secondly, by way of affirmative reply, the plaintiff sets up that it is the custom and usage of the lumber business that clauses similar to the strike clause in the defendant's contract would require the defendant to perform at the option of the purchaser within a reasonable time after the expiration of the strike.

Finally, it is claimed affirmatively that the defendant, after the expiration of the strike, made certain shipments under these contracts, which it is claimed by the plaintiff constitute a construction by the parties as to what this otherwise clear and unambiguous contract means.

Now, as to these three new matters that are brought before Your Honor in the reply, our answer briefly is this: That any attempt of course to show by parol evidence at the time the negotiations were first commenced that an arrangement was made, which is contradicted by the written agreements later entered into and formally signed by the parties, of course would not be admissible in evilence, assuming just for the purpose of argument that the point was even discussed between the parties.

The same is true of the evidence of alleged custom. The law is clear and unequivocal, both in the state and federal courts—and this being a law action we would be bound I take it by the state decisions under the recent ruling of the Supreme Court of the United States—that where the parties have entered into a contract between themselves, and the contract clearly defines the obligation of the parties, any custom that would change the [38] obligation or create an obligation beyond that stipulated by the parties of course likewise cannot be proved, assuming for the moment that there is such a custom; which, at the proper time, if Your Honor should hold this evidence to be admissible, which we think the parol evidence rule prevents, we of course would controvert by evidence.

Finally, it is asserted that certain contracts were carried out after the contract period of shipment had expired, and that that is a construction by the defendants favorable to the plaintiff.

Now, it is pleaded in the complaint that as to one shipment, part of the September 1 contract, I think, a new contract was entered into in April, 1937 at a rate $2.50 higher, which was the increased freight rate applicable to that shipment, and that it was specifically done under an exchange of letters between the parties, that their conduct with reference to the execution of that shipment should be entirely without prejudice.

I may say of course, if the court please, that these controversies arise for practical reasons. The

reason I explained to Your Honor the character of the contract, namely, that my client, the defendant and seller, contracted to sell this lumber on the basis of cost and freight, is of course because that is the manner in which the defendant does business. They contract for the space and they sell the lumber and they sell it at one price. They get the lumber from the mills at a certain figure, they get the steamship rate at so much per thousand at a certain figure, and the two together make the price at which the defendant sells to any buyer such as the plaintiff [39] here.

Now, the evidence of the defendant will show of course that when the longshoremen's strike of 1936 and '37 occurred, the steamship companies who ordinarily had carriage contracts to carry lumber for the defendant of course notified the defendant they could no longer carry, so that the defendant in turn was obliged to rely on its force majeure clause in its contract which relieved it of an obligation which it could not perform.

Now, those are the facts in this case. I think there is very little dispute about it. The plaintiff will offer in evidence, evidence supporting the allegations of the complaint, as to what it actually cost them to get the lumber and the freight elsewhere to carry out these commitments which they in turn had with their buyers in the Orient. We do not dispute those figures. As far as the evidence is concerned on the amount of damages that have been sustained, if the plaintiff has sustained any damage by reason

of breach of contract, we think that their figures represent the reasonable market cost at that time. In other words, as far as the evidence is concerned, the case is in the same condition as it was on demurrer; namely, that we assume the facts alleged in the complaint as far as damage is concerned to be true. We do not controvert the claim of damage.

What we do claim—and this is the question of law involved—is that under the force majeure clause in this contract, where the contract specified definite periods of delivery, and a strike occurred, so that the [40] only period agreed on for delivery by the parties had expired, and shipment could not be made during the contract period agreed by the parties, that performance was permanently excused.

We have pointed out in the briefs on demurrer which are on file, and to which we refer here as a matter of reference, that the great weight of authority supports our conclusion; namely, that where in mercantile contracts the parties agree upon a particular time of delivery, and have also provided for certain conditions which will excuse performance, that if a condition supervenes which makes delivery during the contract period impossible, that delivery is permanently excused, not merely postponed until some reasonable time after the condition which supervened has ceased. Otherwise of course we would get this unusual condition, that if a strike lasted eight months or a year, that it would be the plaintiff's position still that although the

contract period, the only period of delivery on which the parties had agreed, in the light of market conditions as they then understood them, had expired for many months, there was still an obligation to perform within a reasonable time.

Now, the plaintiff contends, if they make the same contention that they made in their brief on demurrer, that while it is true that the contract period had expired, nevertheless we had to deliver after the contract period had expired if they requested it. We could not compel them to take it, but if they requested it, we had to carry out the contract.

Now, as I say, in our view this comes down merely [41] to a question of law. The evidence I think will be largely without dispute, except that we shall object to the evidence under several phases of the affirmative reply which we think under the parol evidence rule is clearly inadmissible.

Mr. McCurtain: If Your Honor please, I did not undertake, nor do I think Mr. Schweppe intended to argue the law of the case in his opening statement; but I do want, in reply to what he has had to say, to make this point so that Your Honor will start with a clear mind as to our respective positions. We do not go so far as to say that a strike might not be of such duration that it would amount to a frustration of the contract; but we say that is a question which this court and all courts having like controversies must necessarily determine as to what is a reasonable length of time.

In other words we do not say that there can be no case imagined where the impediment would be so great or of such long duration that any court or this court would say it would still compel performance; but we say the test and the rule is whether the defendant or the seller can within a reasonable time deliver, and that all the surrounding circumstances of the parties must be considered by each jurist in construction of contracts of like character.

The Court: At this point we will take a five minute recess.

(Recess)

The Court: You may proceed.

Mr. McCurtain: I will call Mr. Darling. [42]

R. J. DARLING,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCurtain:

Q. Your name is R. J. Darling?

A. Yes, sir.

Q. What relation do you bear, Mr. Darling, to the plaintiff, Dant & Russell Inc., a corporation?

A. I am vice president and office manager.

Q. As such, Mr. Darling, do you conduct or handle most of the correspondence concerning its out of town contracts? A. I do, sir.

(Testimony of R. J. Darling.)

Q. The home office of the plaintiff Dant & Russell is in Portland, Oregon? A. Yes, sir.

Q. And it has a branch office here under the control of Mr. J. J. Connolly? A. Yes, sir.

Q. I hand you, Mr. Darling, what bears number CX532 and the date of August 31, the yellow sheet apparently on the letterhead form of Dant & Russell, and ask you to state what that document is?

The Court: Before having the witness refer to it, have the clerk give it an identification mark.

Mr. McCurtain: Very well. If Your Honor please, I have affixed certain documents together in each case, being the order of the plaintiff, the contract submitted by the defendant, and a copy of the shipping instructions of the plaintiff. Perhaps those could each take one exhibit number? [43]

The Court: Yes, it would seem to me to be appropriate.

Q. (By Mr. McCurtain) I will hand you, Mr. Darling, what has been marked by the clerk of this court as Plaintiff's Exhibit No. 1, being a series of documents; and will ask you to identify each and advise the court what each document is.

Mr. Schweppe: If the court please, I think we can shortcut this. All of these contracts are set up in the complaint, and we have admitted them; and if you will take all of these contracts that you have sued on and put them in one file and simply iden-

(Testimony of R. J. Darling.)

tify them as the contracts on which the plaintiff is suing, it is merely evidential affirmance of what is already admitted as a matter of pleading. We can shortcut it perhaps rather than take the full time on each one of these contracts.

Mr. McCurtain: I think that is true, Mr. Schweppe; but I think the witness should identify one series so that each document will be clearly before the court.

The Court: You may proceed.

A. In this list of documents, the first is a copy of our order to the Grays Harbor Exportation Company for 500,000 feet of hemlock logs, to Tsingtau, China, purchased on a cost and freight price from this concern. The second is a copy of their contract which was signed between us covering the same sale. The third is a copy of our shipping instructions to the Grays Harbor Exportation Company instructing them how to make their bills of lading. The fourth in this particular one is the corrected contract, covering 250,000, an unshipped portion [44] which remained after the stevedore strike in 1936 and early '37.

Q. And that subsequent shipment was made, I believe, approximately March 4 on the Granville?

A. Yes, the motorship Granville.

Mr. McCurtain: I then offer this exhibit in evidence, Your Honor.

The Court: Any objection?

Mr. Schweppe: No objection.

(Testimony of R. J. Darling.)

The Court: It is admitted, Plaintiff's 1.

(Plaintiff's Exhibit No. 1, contract and other documents, admitted in evidence.)

(Part of
PLAINTIFF'S EXHIBIT 1)

Grays Harbor Exportation Company, Inc.

Main Office	Seattle Office
Douglas-Weatherwax Bldg.	Exchange Building
Aberdeen, Wash.	Seattle, Wash.

CONTRACT

September 1, 1936

Buyer: Dant & Russell, Inc., Portland, Oregon.

Commodity: Pacific Hemlock Logs.

Quality: Camp Run Export Grades, per Mackie & Barnes Grading Rules #4.

Inspection: P. L. I. B. Certificate final as to measure, quality and quantity.

Quantity: 500,000′ B. M. Bre. Scale—10% more or less, seller's option.

Specification: Tops 12″/ up, av. 16″ or larger—nothing over 32″-12′ to 32′, av. 16′/up.

12′ and 24′ logs most desired.

Butts to be cut 24′ as far as possible.

Mark:

Price: $14.25 per M′ Bre. Cost & Freight.

Payment: Cash against documents.

Shipment: October.

(Testimony of R. J. Darling.)

From: Grays Harbor/Willapa Harbor, seller's option.

To: Tsingtau, China.

Vessel:

Expected Time of Loading:

General Conditions:

Delivery and/or shipment of material under this contract is subject to acts, requests or commands of the Government of the United States of America and all rules and regulations pursuant thereto adopted or approved by the said Government, and the seller is not liable for delay or non-shipment or for delay or nondelivery if occasioned by acts of God, war, civil commotions, destruction of mill if named, fire, earthquakes, epidemics, diseases, re- [172] straint of princes, floods, snow, storms, fog, drought, strikes, lockouts, or labor disturbances, quarantine, or nonarrival at its due date at loading port of any ship named by the seller, or from any other cause whatsoever, whether or not before enumerated, beyond the seller's control, or for any loss or damage caused by perils usually covered by insurance or excepted in bills of lading, or for outturn. Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned causes, if so required by the seller, provided the delay does not exceed thirty days. The conditions of usual charter party and/or bills of lading are hereby accepted by the buyers and the

(Testimony of R. J. Darling.)

same are hereby made a part of this contract, save that said conditions shall not limit the exceptions above enumerated.

Upon delivery of the goods to vessel all obligations of the seller hereunder shall cease and terminate, it being understood that thereafter the goods are for the account and risk of the buyers.

In the event of war affecting this contract, the seller has the right of cancellation or charging to the buyers the extra premium for insurance against war risk. Buyers may at any time instruct that seller place war risk insurance, the cost of which is to be for buyers' account, if it can be obtained.

The terms of this contract are herein stated in their entirety, and it is understood that there is no verbal contract or understanding governing it.

This contract is to be governed by the laws of the State of Washington, U. S. A., so far as applicable, and otherwise by the laws of the United States of America.

GRAYS HARBOR
EXPORTATION CO., INC.
(J. P. HERBER)
Seller

.....

Buyer

Seller's No. S4545 Amended
Buyer's No. CX-532

Buyer must sign and return duplicate of contract immediately. [173]

(Testimony of R. J. Darling.)

Grays Harbor Exportation Company, Inc.

Sales Office	Main Office
Exchange Building	Douglas-Weatherwax Building
Seattle, Washington	Aberdeen, Washington

—Representing—

Manufacturers and Producers of Forest Products on Grays Harbor and Willapa Harbor

CONTRACT

Dated at Seattle, Washington, April 6, 1937.

The Grays Harbor Exportation Company, Inc., as seller, hereby agrees to sell, and the buyer hereinafter named agrees to buy, upon the following terms and conditions:

Buyer: Dant & Russell, Inc., Portland, Oregon.

Commodity: Pacific Hemlock Logs.

Quality: Camp Run Export Grades, per Mackie & Barnes Grading Rules #4.

Inspection: P. L. I. B. Certificate Final as to measure, quality and quantity.

Quantity: 250,000′ B. M. Bre. Scale—10% more or less, seller's option.

Specification:

Tops 12″/up, av. 16″ or larger—nothing over 32″-12′ to 32′, av. 16′/ up.

12′ and 24′ logs most desired.

Butts to be cut 24′ as far as possible.

Odd lengths to be held to a minimum.

(Testimony of R. J. Darling.)

Mark: Hammer mark only.

Price: $16.75 per M′ Bre. Cost & Freight. Insurance for buyer's account.

Payment: Cash against documents.

Shipment: May.

From: Willapa Harbor.

To: Tsingtau, China.

Vessel: M. S. "Nordpol".

Expected Time of Loading: due approx. May 15-20. [174]

General Conditions:

Delivery or shipment of material under this contract is subject to acts, requests or commands of the Government of the United States of America and of any state, including any municipal subdivision thereof, wherein such delivery or shipment is to be made, and all rules and regulations pursuant thereto adopted or approved by the said Government or any such state; and the seller's performance of this contract is contingent upon, and the seller is not liable for delay or nonshipment or for delay or nondelivery occasioned by, acts of God, war, civil commotions, destruction or incapacitation of mill supplying said material for seller, fire, earthquakes, epidemics, disease, restraint of princes, floods, snow, storms, fog, drought, strikes, lockouts, or labor disturbances, quarantine, or nonarrival at its due date at loading port of any ship named by the seller, or from any other cause what-

(Testimony of R. J. Darling.)

soever, whether similar to the foregoing or not, beyond the seller's control, or for any loss or damage caused by perils usually covered by insurance or expected in bills of lading, or for outturn. Buyers agree to accept delayed shipment or delivery when occasioned by any of the aforementioned causes, if so required in writing by the seller, provided the delay does not exceed thirty days, at the end of which required extension, if any, this contract shall be deemed cancelled, unless expressly extended by further agreement in writing. The conditions of charter party or freight contract governing any shipment made hereunder, and of bills of lading issued with respect thereto, are hereby accepted by the buyers and the same are hereby made a part of this contract, save that said conditions shall not limit the exceptions above enumerated.

Upon delivery of the goods to vessel all obligations of the seller hereunder shall cease and terminate, it being understood that thereafter the goods are for the account and risk of the buyers.

In the event of war affecting this contract, the seller has the right of cancellation or charging to the buyers the extra premium for insurance against war risk. Buyers may at any time instruct that seller place war risk insurance, the cost of which is to be for buyer's account, if it can be obtained.

(Testimony of R. J. Darling.)

The terms of this contract are herein stated in their entirety, and it is understood that there is no verbal contract or understanding governing it.

This contract is to be governed by the laws of the State of Washington, U.S.A., so far as applicable, and otherwise by the laws of the United States of America.

GRAYS HARBOR
EXPORTATION CO., INC.
(J. P. HERBER)
Seller
DANT & RUSSELL, INC.
Buyer
By (R. J. DARLING)

Seller's No. 8873
Buyer's No. CX-532

Buyer Must Sign and Return Duplicate of Contract Immediately. [175]

Q. (By Mr. McCurtain) Now, please state in like manner, Mr. Darling, as to the documents which I now hand you and which have been marked by the clerk of this court as Plaintiff's Exhibit No. 2? You need not repeat, except to identify the documents.

A. This contains the same documents as in the previous, except that it does not have the copy of the order, and covers one million feet of hemlock

(Testimony of R. J. Darling.)

logs for shipment during October, November, and December of 1936.

Q. I now hand you Plaintiff's Exhibit No. 3 for identification and ask you to make the same statement concerning that?

A. This is a similar contract, covering 200,000 feet of hemlock logs to be shipped to Shanghai during October-November of 1936.

Q. And Exhibit No. 4?

A. Similar documents covering an order for 500,000 feet of hemlock logs, for shipment during December, 1936. [45]

Q. And will you make the same statement concerning Exhibit No. 5?

A. Exhibit No. 5 covers 500,000 feet of hemlock logs for shipment during January, 1937.

Q. And number 6, the same statement please?

A. Number 6 covers 500,000 feet of hemlock logs for shipment during February, 1937; and to this is attached a copy of a bill of lading covering shipment of 494,176 feet by the motorship Granville. The bill of lading is dated the 4th day of March, 1937.

Q. Did your firm consider, Mr. Darling, the shipment of the 494,000 odd as a fair compliance with the order for 500,000 specified by the contract?

A. We did.

Q. Now I hand you Plaintiff's Exhibit No. 7 and ask you to state what those documents are?

(Testimony of R. J. Darling.)

Mr. McCurtain: These are the ones, Mr. Schweppe, that have to do with the lumber to Hong Kong.

Mr. Schweppe: That is the 150,000 or 200,000 feet or whatever it is?

Mr. McCurtain: Yes.

Mr. Schweppe: May I say, for the benefit of the record, and I think Mr. McCurtain will agree, that the six contracts that have been introduced in evidence are the six contracts upon which suit is brought, and which I have admitted to be the contracts between the parties, Exhibits 1 to 6.

Mr. McCurtain: That is correct.

A. Exhibit No. 7 covers a copy of our order C2813, covering 50,000 feet of number 3 common boards for shipment to [46] Hong Kong, and also a copy of the Grays Harbor Exportation Company's contract S4624, covering 100,000 feet, which also includes our order number C2814.

Q. Which, Mr. Darling, is Exhibit 8 for identification?

A. Exhibit No. 8, for shipment during December.

Mr. Schweppe: Each for 50,000 feet?

Mr. McCurtain: No. The point about that, Mr. Schweppe, is this: We gave two separate orders by number 2813 and 2814; and Mr. Herber, your client, made them up on one contract giving them a certain number.

(Testimony of R. J. Darling.)

Q. (By Mr. Curtain) Exhibits No. 7 and No. 8, Mr. Darling, are two separate orders given by you, which the defendant concern wrote up on one contract?

A. That is correct.

Q. Giving it their number what?

A. Their number was S4624.

Q. And do the bills of lading attached to each of these exhibits, namely No. 7 and No. 8, indicate when this lumber was shipped?

A. It was shipped on the motorship Granville, and this particular one is dated March 5, 1937.

Q. Now, I hand you what has been marked Plaintiff's Exhibit No. 9, and ask you to state what that series of documents covers?

A. Exhibit No. 9 covers 50,000 feet of boards for shipment to Hong Kong during the first half of November, Dant & Russell's order number C2858, Grays Harbor Exportation Company's contract S4647, together with shipping instructions and bill of lading covering 48,000 feet shipped on the motorship Granville on the 4th day of March, 1937.

[47]

Q. And what is the last document attached to that exhibit?

A. The last document is a copy of the invoice of the Grays Harbor Exportation Company, in which they billed us at the contract price of $19.00.

Q. And the bill was of course paid?

(Testimony of R. J. Darling.)

A. The bill was paid.

Mr. McCurtain: No, if Your Honor please, I offer in evidence first Exhibit Nos. 2 to 6, to complete the file of the exhibits covering the contracts in suit.

Mr. Schweppe: No objection, if the court please.

The Court: Each of them, 2 to 6 inclusive, Plaintiff's Exhibits, are admitted. Each and all of them are admitted.

(Plaintiff's Exhibits Nos. 2 to 6 inclusive, contracts and other documents, admitted in evidence.)

Mr. McCurtain: I now offer in evidence Exhibits No. 7, 8 and 9, being the documents covering the orders of lumber to Hong Kong, as one offer.

Mr. Schweppe: I object to the offer of Exhibits 7, 8 and 9 on the ground that those contracts are incompetent, irrelevant and immaterial, for the reason that they are transactions not sued upon in the complaint. I assume that what plaintiff is proving here is the cause of action set forth in the complaint; and it is our position, and we give as a reason for our objection, that these contracts have no bearing upon the cause of action set forth in the complaint, and are incompetent, irrelevant and immaterial.

The Court: Is there any response on your part?

[48]

(Testimony of R. J. Darling.)

Mr. McCurtain: The only response, Your Honor, is this: That we have ample authority to support the view and will submit it to Your Honor if there is any doubt in Your Honor's mind, that the construction placed on a contract in identical terms by the defendant, which shows that it did make without question shipments covering three separate orders, or two separate orders, calling for deliveries as early as October, 1936, in March of 1937; by so doing, they themselves construed the contract adversely to their present contention.

The Court: I am going to admit the documents. As to whether or not they will be sufficient to sustain the plaintiff's position in the case is another matter.

Mr. McCurtain: That of course is debatable.

The Court: The objections to these Exhibits 7 to 9 inclusive are overruled, and each of them is admitted in evidence.

(Plaintiff's Exhibits 7, 8 and 9, contract and other documents, admitted in evidence.)

Mr. McCurtain: If the court please, I will read a stipulation into the record which I believe counsel for the defendant will approve. It is to the effect that Exhibit No. 10, as marked by the clerk of this court, being a check drawn by the plaintiff to States Steamship Company in the sum of $26,988.18, together with bills of lading and documents attached covering that payment, together with a

(Testimony of R. J. Darling.)

ledger sheet of the plaintiff showing an item of $8,433.81 as paid June 10, 1937, journal entry 276, with three attached invoices receipted by J. M. Ball, representing certain footage of logs and the price [49] thereon, together with a check which balanced the ledger account, indicate and prove payment of the exact damages alleged in the complaint here in action; and that if the court shall find the defendant liable to have delivered the merchandise sued for or covered by the complaint, that the court may then assess the damage as shown by these documents and in the amount claimed in the complaint.

Mr. Schweppe: Yes, we agree to that stipulation. We agree that if the court finds that the plaintiff has sustained any damage by reason of any breach of contract on the part of the defendant and the matters claimed in this suit, that they have suffered the damage alleged in the complaint and shown by these documents.

The Court: Which documents are Plaintiff's Exhibit 10?

Mr. Schweppe: Which documents are Plaintiff's Exhibit 10?

The Court: Let that Exhibit now be admitted. It is so ordered.

(Plaintiff's Exhibit No. 10, cancelled check, ledger sheet and bills of lading, admitted in evidence.)

(Testimony of R. J. Darling.)

Mr. McCurtain: Now, I have here, Your Honor, the file of letter correspondence, and a copy I think of telegrams included, and which contains all of the letters which as I view the situation relate to this controversy, and which are signed by an officer on behalf of the defendant company; and if Mr. Schweppe will produce as per notice the originals of the carbon copies of our letters and telegrams, we may introduce, I think, that entire file as one exhibit. I do not think there is any- [50] thing objectionable, Mr. Schweppe, on either side to the correspondence. That will give Your Honor the complete written file. Or if you prefer, Mr. Schweppe, I have extra copies, and I can just leave the file intact if you will stipulate that the carbons shown and which appear to have been signed by the plaintiff were in fact signed, and that you have received the originals thereof.

Mr. Schweppe: We are perfectly willing to do that. We have copies apparently of the entire file, except this letter of March 8 which you referred to in your notice to produce. We cannot find the original; but it has no important bearing on the controversy. That is, it does not change the rights of the parties one way or the other.

Mr. McCurtain: I think that is true.

Mr. Schweppe: And I will stipulate that this may go in as one file, subject to our opportunity to look at it again and see if we can find any additional ones to go into the exhibit.

(Testimony of R. J. Darling.)

Mr. McCurtain: Very well. And will you also stipulate, Mr. Schweppe, that a copy of a letter which bears date January 8, addressed to the plaintiff by Grays Harbor Exportation Company, was not in fact mailed by the defendant to the plaintiff, but that the copy, as noted in a memo on it, was delivered to me as plaintiff's counsel by your client acting through Mr. Herber on March 18, 1937, in Seattle?

Mr. Schweppe: Yes, we will so stipulate. Now, this is Exhibit 11.

The Court: What you have just been speaking of [51] is Plaintiff's Exhibit 11 for identification.

Mr. Schweppe: Yes, and we agree that it may go into evidence subject to our opportunity to examine it to see if all the letters are there that passed between the parties. This purports to be the file of all correspondence passing between the parties with reference to the subject in controversy here now.

The Court: The court's statement using the words "what you have been referring to," the court meant the file, the entire file which is marked Plaintiff's Exhibit 11. If it is offered, it is now admitted. Do you offer it?

Mr. McCurtain: Yes, I offer it in evidence, Your Honor.

The Court: It is admitted, Plaintiff's Exhibit 11.

(Plaintiff's Exhibit No. 11, letter file, admitted in evidence.)

(Testimony of R. J. Darling.)

PLAINTIFF'S EXHIBIT 11

Grays Harbor Exportation Company, Inc.
Seattle, Washington
September 1, 1936

Dant & Russell, Inc.
Portland, Oregon

S4545—Yours CX-532

We are attaching our amended order S4545 covering 500,000′ Camp Run Hemlock Logs, from which you will note we now show average tops and lengths desired by you.

Please return original order sent you last night, together with signed duplicate of the attached.

GRAYS HARBOR
EXPORTATION CO., INC.
By (M. SANBORN)

Encl MS [176]

Grays Harbor Exportation Company, Inc.
Seattle, Washington
February 24, 1937

Dant & Russell, Inc.
Portland, Oregon

M. S. "Granville"

Confirming our verbal advice to Mr. Connolly yesterday, the following orders for your account

(Testimony of R. J. Darling.)

are on the lineup of the above vessel, now scheduled to arrive our district on/or about March 5:

S4609#4—Your	CX 549
S4624 -	CX 2813-2814
S4647 -	CX 2858

Unless your shipping instructions have been changed, it will not be necessary to send new ones.

GRAYS HARBOR
EXPORTATION CO., INC.

By (M. SANBORN)

MS
CC Mr. Connolly [177]

February 25, 1937

Grays Harbor Exportation Co.,
Exchange Building,
Seattle, Washington.

Gentlemen:

We thank you for your letter of February 24th giving us line-up of the SS "Granville".

However, we wish to refer you to our space contract S4662, covering 85M to 100M Squares for Shanghai, previously booking MS "Panama" and ask if you can advise us when you can nominate a steamer for this order. You might also inform us

(Testimony of R. J. Darling.)
as to our order CX 510, covering 500 M ft. Hemlock Logs for Shanghai.

Yours very truly,
DANT & RUSSELL, INC.
By

HSM:RL
CC Joe Connolly [178]

Grays Harbor Exportation Company, Inc.
Seattle, Washington

March 6, 1937

Dant & Russell, Inc.
Portland, Oregon

MS "Granville"

We refer again to our advice of February 24 that our order S4609 #4—your CX549, covering 500M′ of Hemlock Logs was on the lineup and would be shipped on the above vessel. Please be advised that the increase in freight rate of 87½¢ per M′ Brereton per agreement between shippers and Conference steamship lines on certain pre-strike freight contracts, is for your account.

We will appreciate your immediate confirmation of this understanding.

The freight rate on Hongking remains unchanged.

(Testimony of R. J. Darling.)

We regret that this information was overlooked in our advice of February 24.

GRAYS HARBOR
EXPORTATION CO., INC.
By (J. P. HERBER)
General Manager

JPH:WJY
cc Mr. Connolly [179]

March 8, 1937.

Grays Harbor Exportation Co.,
Exchange Bldg.,
Seattle, Washington.

Gentlemen:-

Referring to your letter of March 6th regarding shipment of 500,000 feet of Hemlock Logs on the SS. "Granville", we note that you expect to increase the price of these logs by 87½¢, which we presume is increased freight you have been obliged to pay subsequent to the strike.

Under no conditions can we agree to this. We must insist that our orders are filled complete at the contract prices. The freight rates you pay are of no concern to us, if you pay less it is your profit and if you pay more it is your loss.

We are in the same situation you are; our losses for this very same reason will run into many thou-

(Testimony of R. J. Darling.)

sands of dollars. We are living up to our contracts and insist upon you living up to yours.

Very truly yours,
DANT & RUSSELL, INC.
By

cc/Joe Connolly.
RJD:RA [180]

Grays Harbor Exportation Company, Inc.
Seattle, Washington

March 11, 1937

Dant & Russell, Inc.
Portland, Oregon

M.S. "Granville"

We have today drawn sight draft on you in amount of $2,806.98, covering the following parcels shipped per the above vessel:

S4647/8686—Your C-2858	48,000′ Amt.	$ 912.00
S4624/8668—Your C-2813 & C-2814	99,736′ "	$1,894.98

Attached are copies of all documents covering the above orders.

GRAYS HARBOR
EXPORTATION CO., INC.
By (M. SANBORN)

Encl. MS
CC Aberdeen [181]

(Testimony of R. J. Darling.)

(COPY)

January 8, 1937

Dant & Russell, Inc.
Portland, Oregon

Gentlemen:

We are sorry to advise you that on account of the prevailing maritime strike on the Pacific Coast we are reluctantly obliged to rely on the force majeure clause in the "General Conditions" of our sales contract with you, and to advise you that since non-shipment of the following orders for your account has been occasioned by a strike throughout the contract period of shipment, the contracts are no longer binding or in force:

Bal.	S4545	Amended—Your	CX 532	October
Bal.	S4566	—	CX 510	November/December
Bal.	S4609 #1	—	CX 550	October/November
	#2	—	CX 547	December
	S4624	—	C2813-14	October/December
	S4647	—	C2858	First half of November

If, when the strike is over, conditions enable us to arrive at a mutually satisfactory agreement with you, we shall be glad to cooperate and take a new order for the business covered by the expired contracts.

(Testimony of R. J. Darling.)

We regret to have to give you this advice, but the circumstances leave us no alternative.

Yours very truly,
GRAYS HARBOR
EXPORTATION CO., INC.
By

JPH:MS
CC Mr. Connolly

Memo: This copy was delivered in Seattle March 18th when we held conference.

A. H. Mc [182]

Dant & Russell, Inc.
Pacific Coast Lumber and Shingles
Porter Building
Portland, Oregon
March 24, 1937

Grays Harbor Exportation Co. Inc.,
Exchange Building,
Seattle, Washington.

Attention: Mr. Herber

Gentlemen:

We refer to the following contracts we hold with you, viz:

Our No. CX-532, Your No. S4545, 9/1/36, 500M, Pacific Hemlock logs, to Tsingtau, China, shipment October, at $14.25 per M, C. & Frt., on which there is a balance due of 250M.

(Testimony of R. J. Darling.)

Our No. CX-510, your No. S4566, 9/4/36, 1,000,000 Pacific Hemlock logs, to Shanghai, shipment November, at $13.75, C. & Frt., on which there is a balance due of 500M, and

Our orders CX-550, 547 and 548, your numbers 4609 #1, 4609 #2, 4609 #3, 9/28/36, the first of which calls for delivery of 200M, Pacific Hemlock logs, to Shanghai, shipment October, at $14.00, C. & Frt., on which there is a balance of 30M, the second of which calls for 500M Pacific Hemlock logs to Shanghai, shipment December, on which no delivery has been made, and the third, calling for 500M, to Shanghai, shipment January, on which no delivery has been made.

At the conference in your office last Thursday, the 18th Inst., between the writer, Mr. Collins representing China Import & Export Lumber Co. Ltd., Mr. McCurtain, our attorney, yourself, and Mr. Schweppe, your attorney, it was agreed that you would, during the then current week, advise us, in writing, either of your unconditional refusal to treat the contracts as in force, or, would submit some other terms under which you would undertake to fulfill the said contracts. [183]

Inasmuch as you have done neither, and our purchaser is demanding immediate fulfillment of our obligations to him for these logs which we sold based on your commitments to us. This will advise you, that failing to hear from you, not later than

(Testimony of R. J. Darling.)

next Monday, we will purchase logs of the grades and quantities called for by your unfulfilled contracts, in the open market, at the best prices obtainable, will ship the same on the best freight contracts obtainable, and will then immediately undertake, by court action, to hold you for the losses sustained by us because of your refusal to complete your contracts before referred to.

Yours very truly,
DANT & RUSSELL, INC.
By [184]

Grays Harbor Exportation Company, Inc.
Seattle, Washington
March 29, 1937

Dant & Russell, Inc.
Attention C. E. Dant, President
Portland, Oregon

Gentlemen:

This will acknowledge your letter of March 24.

First, as stated at the time of our conference, we do not consider ourselves under any liability to you. Nothing has occurred, including the submission of the memorandum of your counsel, to change our opinion on the subject.

However, without prejudice and with a view to arriving at an amicable solution, we have been constantly working on tonnage for Willapa Harbor

(Testimony of R. J. Darling.)

loading, but unfortunately at this moment we are unable to submit to you a definite proposal.

If you can bear with us for several more days, we will continue our efforts and give you a definite reply, say, not later than Friday, April 2.

The writer was absent from the city the best part of last week and your letter was brought to his attention this morning. That account for the delay.

Yours very truly,
GRAYS HARBOR
EXPORTATION CO., INC.
By (J. P. HERBER)
General Manager

JPH:WJY [185]

Dant & Russell, Inc. Copy Portland, Oregon
3/30/37

Grays Harbor Exportation Co.,
Exchange Bldg.,
Seattle, Wash.

Attention: Mr. Herber

Gentlemen:-

This will acknowledge receipt of your letter of March 29, and replying to the same will say, that we will be very glad to give you until Friday, April 2, and while in no wise withdraw our demands for full performance by you, we are willing to help out if possible.

(Testimony of R. J. Darling.)

Since the strike we have chartered ships for ten or eleven cargoes from the Pacific Coast to China and Japan and it might be that we could be of assistance to you in securing space at current rates, or even lower than current rates. All that we could expect you to pay is what we will actually be out of pocket and no more, or no less.

We await any further suggestions you wish to make in the premises.

Yours very truly,
DANT & RUSSELL, INC.,
By

CED:A [186]

Mackay Radio
3/31/37

Grays Harbor Exportation Co.,
Exchange Bldg.,
Seattle, Wash.

Refer to your letter of March twentyninth Stop If you are unable to arrange space for logs enumerated in our letter of March twentyfourth we can secure for you from States Steamship Company space on steamer Illinois or substitute expected to be ready to load during May Stop Loading at Grays Harbor or Willapa Harbor your option one loading Port Stop Rate to Shanghai twenty dollars per thousand feet Brereton Stop Tsingtau

(Testimony of R. J. Darling.)

fifty cents more Stop This offer is firm good for reply April second

DANT & RUSSELL, INC.

DL:MacKay [187]

Grays Harbor Exportation Company, Inc.
Seattle, Washington
April 2, 1937

Dant & Russell, Inc.
Attention Mr. C. E. Dant
Portland, Oregon

Dear Sirs:

We thank you for your offer of log space, per telegram of March 31, which we regret we cannot use. However, without prejudice to our rights and solely as an offer of amicable adjustment and complete compromise, we are prepared to supply 1,500,000′ of camp run hemlock logs of the usual Shanghai specification, on a basis of $7.50 per M′ f.a.s. Willapa Harbor Lumber Mills' dock, for loading on the S. S. "Illinois", or substitute vessel, loading during May.

Also, we are now prepared to reinstate our order S4545-Your CX-532, for shipment to Tsingtau on a vessel to be declared and loading on Willapa Harbor during May/1st half June, on a basis of $16.75 per M′ Cost & Freight Tsingtau.

This offer, together with that on the Shanghai logs, is good for acceptance received here by noon April 7.

(Testimony of R. J. Darling.)

This is all we can suggest at this time and must, therefore, ask that you be guided accordingly.

Yours very truly,
GRAYS HARBOR
EXPORTATION CO., INC.,
By (J. P. HERBER)

JPH:MS [188]

Dant & Russell, Inc. Copy Portland, Oregon
April 3, 1937.

Grays Harbor Exportation Company,
Exchange Bldg.,
Seattle, Washington.

Attention: Mr. H. P. Herber

Gentlemen:-

This answers your letter of the 2nd inst.

Referring particularly to the first paragraph thereof, wherein you offer to supply 1,500,000 feet of Hemlock Logs, usual Shanghai specification, on the basis of $7.50 per 1000 feet f.a.s. Willapa Harbor Lumber Mills dock, is entirely unacceptable as it would mean that these logs delivered at Shanghai would cost us substantially $27.50 per 1000 feet instead of $14.00 per 1000 feet, as per your contract. Hence, we decline to accept the compromise suggestion.

Referring to the second paragraph of your letter, wherein you offer to ship 250,000 feet, balance due on your order S-4545, our CX-532: We are willing

(Testimony of R. J. Darling.)

to accept the offer without prejudice to our contractual rights, inasmuch as this is a small matter and will only involve a difference of $2.50 per 1000 feet. We suggest that you confirm this offer on the understanding that such confirmation shall be without prejudice to either of our respective positions, subject to the damages accruing under our contracts, which in final analysis means that if we ultimately compromise the 1,500,000 feet due to Shanghai, we will have this much out of the way.

Very truly yours,
DANT & RUSSELL, INC.
By

CED:RA [189]

Grays Harbor Exportation Company, Inc.
Seattle, Washington
April 2, 1937

Dant & Russell, Inc.
Portland, Oregon

Our S4662

Referring to your inquiry as to the disposition of the above reservation of space, there has been no substitution for the MS "Panama".

However, we have a vessel loading at the Grays Harbor Lumber Company during May/June and while, under the circumstances, there is no obligation on our part to do so, we are willing, as a matter of cooperation, to carry out this freight com-

(Testimony of R. J. Darling.)

mitment on the vessel on the condition that you pay the increase of 75¢ per M' in line with agreement between the shippers and Conference lines on pre-strike freight contracts.

Please let us know immediately whether or not you accept our offer.

GRAYS HARBOR
EXPORTATION CO., INC.
By (J. P. HERBER)
General Manager

JPH:WJY
ccGrays Harbor Lumber Co.
85M/100 M Space Shanghai
CX500—85M
CX514—12M 2x12 [190]

April 3, 1937

Grays Harbor Exportation Company
Exchange Building
Seattle, Washington

Gentlemen:

Referring to your letter of April 2nd in regard to your space commitment of October 26th, reference S 4662.

Although we are not in accord with you, that you have no obligation in this referred to signed freight contract, we are willing to cooperate and pay the increase rate of 75¢ per M ft, you to ship these two (2) orders for us on your steamer load-

(Testimony of R. J. Darling.)

ing at Grays Harbor Lumber Company during May/June.

However, in our acceptance of this revised condition we wish it to be understood by so doing we in no way waive any point in controversy regarding our other contracts with you.

Yours very truly,
DANT & RUSSELL, INC.
By:

HSM:RL [191]

Grays Harbor Exportation Company, Inc.
Seattle, Washington

April 8, 1937

Dant & Russell, Inc.
Portland, Oregon

In line with your letters of April 3, we attach contracts to cover, duplicates of which please sign and return promptly.

GRAYS HARBOR
EXPORTATION CO., INC.
By (W. J. YOUNG)

Encl.
WJY:MS [192]

(Testimony of R. J. Darling.)

Dant & Russell, Inc. Copy Portland, Oregon
4/9/37

Grays Harbor Exportation Co.,
Exchange Bldg.,
Seattle, Wash.

Gentlemen:-

We have chartered space on the SS "Illinois" for May loading on Willapa Harbor to move some logs we have purchased there.

The freight rate paid by us on this steamer is $20.00 per M feet, which we believe is a little lower than some others are paying, as we sold a cargo today on the basis of $22.00 per M feet (freight) on the MS "Hird", for June/July shipment.

We will leave space open to you until further notice on the SS "Illinois" at $20.00, giving you a chance to fill the orders enumerated in our letter of March 24. In the meantime, if you can charter space or have any other propositions to make we shall be glad to hear from you.

We are returning herewith signed contract No. 8873 and Space reservation No. 8872.

Yours very truly,
DANT & RUSSELL, INC.,
By

CED:A
*enc

Harry Mr. E. has contract and space reservation.

[193]

(Testimony of R. J. Darling.)

4/14/37
Register

Grays Harbor Exportation Co.,
Exchange Bldg.,
Seattle, Wash.

Gentlemen:-

We now must withdraw our offer to you of space on the SS "Illinois", which we made under date of 4/9/37, as we are now compelled to use her to fulfill other commitments, and we could not wait any longer.

We have now arranged for charter of the SS "Michigan" for loading on Willapa Harbor or Grays Harbor, one safe berth, for June Loading—freight rate $20.00 per M feet on Logs, and we wish to give you another opportunity to fill the orders enumerated in our letter of March 24, 1937.

We will leave this space open to you until April 21, 1937.

If you are having difficulty in getting Hemlock logs we can supply them to you on this steamer at $6.25 per M feet, F.A.S. "SS Michigan" Willapa Harbor, which is $1.25 per M feet less than suggested by you in your letter of April 2, 1937.

Awaiting your reply, we are

Yours very truly,
DANT & RUSSELL, INC.
By

CED:A [194]

(Testimony of R. J. Darling.)
Registered Mail

June 17, 1937

Grays Harbor Exportation Co. Inc.,
Exchange Building,
Seattle, Washington.

Attention: Mr. H. P. Herber

Gentlemen:

We direct your attention to an exchange of letters beginning with your letter of April 2nd, our answer of the 3rd, and your reply of April 8th, by which it was agreed that you would ship, in fulfillment of our No. CX-532, at $16.75 without prejudice to our contractual rights.

We now hand you invoice showing a loss to us on the particular item mentioned in such letters, of $634.38, and which invoice also shows our losses on orders unfilled by you under our contracts with you, the aggregate of which is $17,272.17.

In order to reduce our damages to a minimum, we negotiated for, and were able to arrange with our purchaser, to take mixed hemlock and spruce, thus affecting a material saving in price, and we also secured our purchaser's consent to accept ninety (90) per cent delivery, thus reducing the unfilled balances ten (10) per cent, from which it will clearly appear that we have done everything within our power to minimize your losses.

We now re-iterate our previous demands that you immediately arrange to settle the enclosed in-

(Testimony of R. J. Darling.)

voice. Failing to hear from you with satisfactory settlement, will result in our pursuing in court such remedies as the law gives us for the breach of your contract. Thanking you for the courtesy of prompt attention.

Yours very truly,
DANT & RUSSELL, INC.
By

[195]

Invoice No. Date June 17, 1937.
Your Order Your No.
Rate Shipped to
Sold to Grays Harbor Exportation Co., Inc.,
at Seattle, Washington. Consigned to
Via

DANT & RUSSELL
INC.
LUMBER, SHINGLES
BOX SHOOK
1101 Porter Building
Portland, Oregon

MARKS:—

Terms: Cash in exchange for Documents. Payable in U. S. gold Dollars

Camp Run Hemlock Logs, shipped to Tsingtau, China
per MS. "NORDPOL"—Your order #8873, our CX-532:

As per Contract —C & F Tsingtau		$14.25 per M′	
As billed — " "		16.75 "	
253,751′ at difference of		2.50 "	$ 634.38

Camp Run Hemlock Logs, shipped to Shanghai, China per SS. "MICHIGAN"—your order S4609 #2, our CX-547:

As purchased from you—C & F Shanghai		$14.00 per M′
Rebought for your account from) J. M. Ball—FAS Willapa Harbor)	—$ 6.25	
Freight booked for your account) with States Steamship Company)	—$20.00	$26.25 per M′
		C & F Shanghai
462,958′ at difference of		$12.25 per M′ $5,671.24

Camp Run Hemlock Logs, shipped to Shanghai, China per SS. "MICHIGAN"—Your order S4566, our CX-510:

As purchased from you—C & F Shanghai		$13.75 per M′
Rebought for your account from) J. M. Ball—FAS Willapa Harbor)	—$ 6.25	
Freight booked for your account) with States Steamship Company)	—$20.00	$25.25 per M′
		C & F Shanghai
430,084′ at difference of		$12.50 per M′ $5,376.05

DANT & RUSSELL
INC.
LUMBER, SHINGLES
BOX SHOOK
1101 Porter Building
Portland, Oregon

Invoice No. Date June 17, 1937.
Our Order Your No.
Rate Shipped to
Sold to Grays Harbor Exportation Co., Inc.,
at Seattle, Washington. Consigned to
Via

Terms: Cash in exchange for documents. Payable in U. S. gold dollars.

MARKS:—

PAGE #2

Camp Run Hemlock Logs, shipped to Shanghai, China per SS. "MICHIGAN"—your order S4609 #3, our CX-548:

As purchased from you—C & F Shanghai		$14.00 per M′
Rebought for your account from) J. M. Ball—FAS Willapa Harbor)	$ 6.25	
Freight booked for your account) with States Steamship Company)	$20.00	$26.25 per M′
		C&F Shanghai
456,367′ at difference of		$12.25 $5,590.50
Total —		$17,272.17

[197]

(Testimony of R. J. Darling.)

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

GRAYS HARBOR
EXPORTATION CO., INC.
By W. J. YOUNG
(Signature of addressee's agent)

Date of delivery June 18, 1937
(Reverse Side of Receipt)

Post Office Department
Official Business

(Post-marked June 18, 1937
at Seattle, Washington)

Registered Article
No. 214743
Insured Parcel
No.....

.....

Return to Dant & Russell
(Name of Sender)
Street and Number
or Post Office Box 309 S.W. 6 Ave.
Portland,
Oregon.

[198]

(Testimony of R. J. Darling.)

Seattle, Washington
June 26, 1937

Dant & Russell, Inc.
Porter Building
Portland, Oregon

Gentlemen:

Attention Mr. C. E. Dant

Your letter of June 17 enclosing invoice of $17,272.17 has been received and has failed of immediate acknowledgment only because of the writer's absence from the city.

We have previously advised you that, under the terms of our contracts referred to in the invoice, we do not deem ourselves liable in any respect for the claim set forth in the invoice.

We are sorry that this situation has arisen, but can only inform you that we adhere to our position.

Very truly yours,
GRAYS HARBOR
EXPORTATION CO., INC.
By (J. P. HERBER)
General Manager.

JPH:MS [199]

Mr. McCurtain: Of course Your Honor understands that the copies are, under Mr. Schweppe's stipulation, admitted to be copies of originals which they hold in their files, and which were received in due course.

(Testimony of R. J. Darling.)

The Court: Yes.

Mr. McCurtain: Now, if Your Honor please, that concludes the plaintiff's case so far as the documentary evidence is concerned and the proof of damage. I have a number of witnesses here on the question of custom and usage, and one in particular who is anxious to get away. I would like to withdraw Mr. Darling, who will also testify on that point, and call another witness with Your Honor's permission for the accommodation of [52] the witness.

The Court: The court wishes to accommodate the witness. You may be excused temporarily.

Mr. Schweppe: We have no objection.

(Witness excused temporarily)

Mr. McCurtain: I will call Mr. Penketh.

A. S. PENKETH,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

by Mr. McCurtain:

Q. Your name is A. S. Penketh?

A. That is right.

Q. P-e-n-k-e-t-h?

A. That is right, sir.

Q. What is your business, Mr. Penketh?

(Testimony of A. S. Penketh.)

A. Lumber exporting.

Q. How long have you been engaged in the lumber exporting business on the Pacific Coast of the United States or elsewhere?

A. Twenty-five years.

Q. And with what concerns have you been connected during that period of twenty-five years?

A. For twelve years I was connected with a firm in England. I was out here buying for their account. Then for the next seven years I was associated with the Douglas Fir Export Company, which at that time was the Douglas Fir Exploitation and Export Company.

Q. And your present connection?

A. As export manager for the Fairhurst Lumber Company in [53] Tacoma.

Q. Mr. Penketh, I ask you to state, based on your experience of twenty-five years in the exporting business, whether there is a general custom or usage in the trade concerning the construction to be placed upon clauses contained in contracts between exporters, buyer and seller, for export shipment, as to the meaning of or construction of a clause relieving the seller from the obligation to ship during a period of strike or like impediment to the shipment.

Mr. Schweppe: If the court please,—

Mr. McCurtain: (interrupting) First I think he may answer whether there is a custom.

Mr. Schweppe: Did you ask him whether there was a custom?

(Testimony of A. S. Penketh.)

Mr. McCurtain: I asked him whether there is in fact such a custom.

The Witness: Yes, there is.

Q. (By Mr. McCurtain) Now, will you state, Mr. Penketh, what that custom is?

Mr. Schweppe: If the court please, I object to this evidence on the ground that it is incompetent, irrelevant and immaterial; that it is a violation of the parol evidence rule; that obviously the contract between the parties must control the rights of the parties, unless the contract is in any way incomplete or doubtful; that the parol evidence rule prevents and that there are numerous authorities to the effect which prevent the introduction of this evidence; and that necessarily evidence of this character could not be given unless the witness knew [54] what the particular clause in question was between the parties.

The Court: That last objection is sustained. You have got to call his attention to some specific provision.

Q. (By Mr. McCurtain) I hand you, Mr. Penketh, what has been marked Plaintiff's Exhibit 1, and call your particular attention to the printed form which is headed "General conditions" on the bottom portion of the second sheet of the exhibit, the particular document being a contract executed by Grays Harbor Exportation Company concerning deliveries to be made under the contract; and I will ask you to examine the clause.

(Testimony of A. S. Penketh.)

A. (Witness examines document referred to.)

Q. Have you examined the clause, Mr. Penketh?

A. Yes, I have examined the first clause here under "General conditions."

Q. Is that clause a usual clause to be inserted in contracts between exporters?

Mr. Schweppe: I object to that, if the court please, as being incompetent, irrelevant and immaterial. Obviously the only thing that this witness can testify to is whether he knows of any custom with reference to the clause which he has just read. That is the only question that can properly be addressed to him,——

Mr. McCurtain: (interposing) I would agree——

Mr. Schweppe: (continuing) —and I renew the objection that any answer on the part of the witness is a violation of the parol evidence rule.

Mr. McCurtain: I should like, Your Honor, to be heard ultimately if we can't get together on the question [55] here.

The Court: You started to make some agreement as to some part of his remarks, did you not?

Mr. McCurtain: Yes.

Q. (By Mr. McCurtain) Mr. Penketh, is there a custom concerning this clause, or is there a custom concerning which this clause would be construed in the trade, a general custom?

A. I should say so, yes.

Mr. Schweppe: May I ask the witness a preliminary question before he goes on? I think it would be quite helpful.

(Testimony of A. S. Penketh.)

Mr. McCurtain: That is your own phrasing of the question you wished, Mr. Schweppe.

The Court: I think not. I believe cross examination would be sufficient.

Mr. Schweppe: All right.

Q. (By Mr. McCurtain) Will you state, Mr. Penketh, what that custom is?

Mr. Schweppe: I object again to the evidence of any custom as to the construction of this clause. The witness has not testified that he has ever seen this clause before, and upon the particular ground that evidence of custom is not admissible where the contract between the parties is plain and clear as in this instance.

The Court: The objection is overruled. The court does not consider the provision in question so clear as not to admit of construction.

Q. (By Mr. McCurtain) Very well, Mr. Penketh; will you answer then please what is the general custom? [56]

A. The general custom in my experience has been and is that any delays caused by these various exceptions that are recognized as requiring protection is only a delay as long as that cause lasts; and that after that cause has been overcome, the contract has been usually considered as being—having to be completed, and has been completed as a general practice.

Q. And at the contract price?

(Testimony of A. S. Penketh.)

A. At the contract price and under the contract conditions.

Mr. McCurtain: That is all.

Cross Examination

By Mr. Schweppe:

Q. Mr. Penketh, have you ever seen that clause before which has just been handed you?

A. Yes, I have.

Q. When did you see it?

A. Oh, I couldn't give you any specific date. I have seen it in contract forms before.

Q. Have you ever seen that particular contract clause before?

A. Well, I don't know how many forms there are printed up like this. I haven't seen this particular form, no.

Q. I mean have you seen a form of the Grays Harbor Exportation Company bearing that language? A. Yes, I have.

Q. When did you see it?

A. I have seen it this year.

Q. How long have you been familiar with the clause? You have not seen it prior to this year?

A. I couldn't say without going through their files when that clause first appeared. I am not prepared to answer [57] that question.

Q. You yourself have had no experience with that clause at all, have you?

A. Yes, I have.

(Testimony of A. S. Penketh.)

Q. In what respect?

A. Because I have made purchases under it.

Q. Do you know how long that clause has been in use by the Grays Harbor Exportation Company?

A. I don't know that.

Q. You have seen it this year?

A. I have seen it this year.

Q. You are in the export business?

A. Yes.

Q. Where do you sell lumber?

A. To Europe, South Africa and South America principally.

Q. Do you know of any custom in the trade with reference to that particular clause, since you have become familiar with it this year?

A. No, I haven't.

Mr. Schweppe: That is all.

Mr. McCurtain: That is all, Mr. Penketh.

(Witness excused)

Mr. McCurtain: Now I should like to call at this time Mr. Joe Connolly. [58]

JOE J. CONNOLLY,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCurtain:

Q. Your name is Joe J. Connolly?

A. That is right.

(Testimony of Joe J. Connolly.)

Q. What relation do you bear, Mr. Connolly, to the plaintiff firm, Dant & Russell, Inc.?

A. Seattle representative.

Q. How long have you been acting in the capacity of Seattle representative for that firm?

A. Six years.

Q. Do you know the defendant corporation, Grays Harbor Exportation Company?

A. I do.

Q. Is it a fact—this is leading, Mr. Schweppe, I think you will agree——

Mr. Schweppe: That is all right.

Q. (continuing) ——is it a fact that you are the agent who negotiated the various contracts which you have heard discussed here and which are in suit here?

A. That is a fact.

Q. With whom did you deal, that is, what officer or agent representative of the defendant concern did you deal with concerning those contracts?

A. The original negotiations were with Mr. Herber.

Q. That is Mr. J. P. Herber? A. Yes.

Mr. McCurtain: Mr. Schweppe, Mr. Herber is the president, is he not? [59]

Mr. Schweppe: No, but he is the general manager.

Mr. McCurtain: He is the executive head?

Mr. Schweppe: He is the executive head of the defendant.

(Testimony of Joe J. Connolly.)

Q. (By Mr. McCurtain) Now, state to the court what did in fact transpire with relation to these several contracts as to the purchase of the quantities of logs covered thereby? I mean leading up, Mr. Connolly, to the making of the contracts?

A. Well, the negotiations were actually started in Portland. The Portland office gets an inquiry for an order for a certain special bill of goods or lumber. They contact me usually by phone and give instructions to canvass the market here to see just what price and what terms this particular parcel or parcels of lumber or logs can be obtained for. In this particular case we were contacted on this business by the Grays Harbor Exportation Company by Mr. Herber. I in turn passed those quotations down to Portland, and after the passage of—I am not certain just how many cables to our buyer in Shanghai, the order was eventually closed.

Q. I take it, Mr. Connolly, that there was nothing in those negotiations which was in any sense at variance with the written contracts?

A. Not a thing.

Q. In other words neither you nor Mr. Herber discussed at those preliminary dickerings, if I may so call it, as to price and terms, as to the legal or formal documents to follow?

A. There was no question of that at all. [60]

Q. Now, you of course were familiar with the quantities and the shipping dates required under the contracts which are in evidence here?

(Testimony of Joe J. Connolly.)

A. I was.

Q. Now, I want you to state, Mr. Connolly, how many times if you can, or if not, with what frequency, you saw Mr. Herber or any other representative of the defendant concern subsequent to February 4 or 5, 1937?

A. Subsequent to that?

Q. Yes, subsequent to the end of the strike, which was either the 4th or 5th of February, 1937.

A. It is difficult to say just how many times. I would say conservatively at least two or three times each week.

Q. And what, Mr. Connolly, was the subject of your conversations with the defendant concern subsequent to the cessation of the strike?

A. All the conversations I recall were as to when the various contracts were to be shipped.

Q. What if anything was said to you at any of those conferences subsequent to February 5, 1937 as to the liability of the defendant to fulfill the contracts at a later date?

A. I do not recall any, that is, up until the time when they definitely went on record that they would not ship.

Q. And when would you say was the time, Mr. Connolly, when as you state it they definitely went on record as to that?

A. It was immediately after we had received the documents on that February portion, which they shipped under the contract price, that portion of

(Testimony of Joe J. Connolly.)

the contract which called [61] for February shipment; but in any event, they handed us the documents and said that that was a completion of the February portion, and that they were not liable for the shipment of anything that should have been shipped during the strike months.

Q. That would be approximately March 5, 1937?

A. That is about right.

Q. Would that be the approximate date?

A. Yes, sir.

Q. Was there any discussion, Mr. Connolly, as to when the defendant expected to ship these various cargoes?

A. There was considerable discussion.

Q. That is to say, discussions between the end of the strike and March 5?

A. There was. Mr. Herber was good enough to keep in touch with us and advise us of the negotiations he was having with the steamship company, whom I recall was a firm domiciled in San Francisco, with whom he carried on his negotiations direct rather than through their local representative.

Q. Do you know what lines they represented?

A. The Klaveness Line. These wires that Mr. Herber showed me were not addressed to the line or signed by the line, their replies. In each case as I recall it they were signed by the manager. I am sorry; I don't recall that name.

Q. And they had to do with space contracts which he was attempting to negotiate?

(Testimony of Joe J. Connolly.)

A. When various vessels would be put into Willapa or Grays Harbor. [62]

Q. Were you present, Mr. Connolly, at a conversation or conference, if I may so term it, had in Mr. Herber's office, that is to say the office of the defendant concern, on March 18, 1937, at which were present Mr. Schweppe, counsel for the defendant, myself, Mr. Dant, yourself, and I think Mr. Collins from China? A. I was.

Q. After that conference of March 18, 1937, what if anything was said to you by Mr. Herber or any other officer of the defendant concern concerning the fulfillment of the contracts?

A. Well, as I recall either yourself or Mr. Dant wanted to know at that time just what the status of those contracts was. From there on in I frankly don't recall any discussion of those except the letters we got.

Q. Do you recall what if any statements were made by the defendant or Mr. Herber as its representative at that conference as to whether they would or would not in fact complete the contracts?

A. No. He refused to go on record as I recall it on that right at that time, although the point isn't particularly clear in my mind.

Q. Mr. Connolly, during the period from October 28, 1936 to the 5th of February, 1937, and particularly on or about January 8, 1937, what if any conversation did you have with Mr. Herber or other representatives of the defendant concern concerning the fulfillment of these contracts?

(Testimony of Joe J. Connolly.)

A. None. The question of those contracts was not discussed during the period that the strike was on.

Q. No discussion whatsoever as far as you recall? [63]

A. No. There may have been general discussion, but there were no specific statements made either way regarding those contracts during the month that the strike was in progress.

Q. And that continued, as I now understand your testimony, up to sometime approximately the 6th of March? A. That is right.

Mr. McCurtain: I think that is all.

Cross Examination

By Mr. Schweppe:

Q. Mr. Connolly, you had been advised, had you not, by Mr. Herber when you began having conversations with him about these contracts, that the steamship companies had cancelled the underlying space contract on these shipments?

Mr. McCurtain: Just a moment. I object to that as not proper cross examination and as wholly immaterial. I think it makes no difference, Your Honor, whether the defendant had difficulty in getting space or not. I think the test can never be difficulty of performance. The question is liability of performance. In other words I take the position that any inquiry of any witness as to troubles Mr. Herber or his concern were having to get space——

(Testimony of Joe J. Connolly.)

Mr. Schweppe: (interposing) He has already testified, Your Honor, that Mr. Herber showed him certain telegrams passing between them and the steamship companies, that he was consulted on it. All I am asking him is whether or not he was not specifically advised that the underlying freight contracts with respect to the shipments here in evidence had been cancelled by the steam- [64] ship companies.

Q. (By Mr. Schweppe) Mr. Herber so advised you, did he not?

A. I have never been advised that Mr. Herber had ever booked this space, so I am not in a position to say whether it was ever cancelled.

The Court: I will rule that the question objected to is proper.

Mr. McCurtain: I have no objection, Your Honor. I misunderstood the question.

The Court: It is within the scope of the direct examination.

Q. (By Mr. Schweppe) I merely asked you, Mr. Connolly, whether or not you were advised that the steamship companies who were to carry this cargo had refused to go forward with their commitments at the time Mr. Herber showed you these telegrams that you were talking about?

A. Well, the last telegram that I recall, Mr. Schweppe, was the steamship line's refusal——

Q. (interrupting) I am merely asking you a question that you can answer yes or no. Were you or were you not advised that the steamship com-

(Testimony of Joe J. Connolly.)

panies had cancelled their shipping contracts and refused to go forward?

A. Would you mind putting that "cancelled this particular contract"? I don't want to answer that question in generalities. In other words, if you will ask me if they cancelled this particular contract that he had booked, I am in a position to answer.

Q. Well, answer that question then the way you have limited it. What is your answer to that?

A. No. [65]

Q. He did not advise you? A. No.

Q. You knew however, did you not, Mr. Connolly, that at the cessation of the strike, because of the long suspension of business, freight rates had moved up very sharply for ocean shipping to the Orient? You did know that? A. Yes.

Q. And you did know that the cause of the conference and of the argument between yourself and Mr. Herber was on account of the freight rates, isn't that right?

A. No, I don't think that is quite so, freight rates. Just what argument between myself and Mr. Herber are you referring to?

Q. Didn't the discussion—of course I am just trying to follow out your direct examination. You said that you had some conferences with Mr. Herber in which you were shown some telegrams passing back and forth between him and the Klaveness Line? A. That is true.

(Testimony of Joe J. Connolly.)

Q. Now I am asking you whether it is not a fact that you knew that the difficulty which existed at that time was over freight rates?

A. Oh, yes, I think so.

Q. Yes, that was my question.

The Court: Is there any reason why this witness cannot be here this afternoon?

Mr. McCurtain: No, there is no reason.

The Court: Then court is recessed until 2:00 o'clock this afternoon. [66]

(Whereupon a recess was taken until 2:00 o'clock P. M. of this day, October 4, 1938, at which time proceedings were resumed as follows:)

The Court: You may proceed.

Mr. Schweppe: I believe Mr. Connolly was on the stand.

JOE J. CONNOLLY

resumed the stand.

Cross Examination

Resumed.

By Mr. Schweppe:

Q. Isn't it a fact, Mr. Connolly, that on the 11th day of January, 1937, Mr. Herber called you over to his office and explained to you that the steamship company had cancelled the space commitment, and that the Grays Harbor Exportation Company

(Testimony of Joe J. Connolly.)

would not go forward with the Dant & Russell orders which are here in controversy?

A. I am sorry; I do not recall that.

Q. You don't recall it? A. No.

Q. You would not say that that may not have been a fact?

A. I wouldn't be prepared to say that, no.

Mr. Schweppe: That is all.

The Court: Any further questions?

Redirect Examination

By Mr. McCurtain:

Q. I did not understand, Mr. Connolly, the last answer.

Mr. Schweppe: He said he would not be prepared to say that that was not the fact.

Q. That is, you are not certain whether he did not call you over on January 11 and tell you that he would not go forward with them? [67]

A. I frankly do not recall the incident at all.

Q. You have no recollection of it?

A. No. It is not a question of the date; I don't recall that.

Mr. McCurtain: That is all.

Mr. Schweppe: That is all, Mr. Connolly.

(Witness Excused)

Mr. McCurtain: Will you take the stand, Mr. Darling, please?

The Court: You may resume the stand; you are already under oath.

R. J. DARLING,

recalled as a witness on behalf of the plaintiff, being previously duly sworn, testified as follows:

Direct Examination

By Mr. McCurtain:

Q. How long, Mr. Darling, have you been engaged in the exporting business?

A. Twenty-eight years.

Q. Are you entirely familiar with the clause in the contract concerning which you testified this morning? A. I am.

Q. What is the fact as to whether there is or is not a general custom for the construction of that or similar clauses in contracts by exporters generally?

Mr. Schweppe: I make the same objection that I made this morning, if the court please, on the ground that the question elicits an answer which would be in violation of the parol evidence rule; which would violate this contract, which is clear and explicit upon its face, [68] and specifically provides that this contract contains the entire engagement between the parties. I further object upon the ground that the question calls for a statement as to a general custom, without limiting it to the particular contract here in question.

The Court: That last objection only is sustained. Call his attention to the specific wording of the contract about which you are asking him to state whether or not there is a custom.

(Testimony of R. J. Darling.)

Mr. McCurtain: I have some authorities on the proposition of proving general custom; and I have felt, as has my associate, that perhaps Your Honor has not fully understood our position on that. We believe, as lawyers, that the question is not only as to the particular clause, but as to a custom in the trade concerning clauses in their general intent and effect that are the same. Mr. Schweppe wholly misunderstands our position with respect to the right to prove custom. The authorities are quite unanimous in holding that custom is not proved for the purpose of varying the contract, nor do we seek to in any respect vary the terms of this contract. We seek to aid the court in its construction by custom, which we think is clearly admissible under the authorities which we are prepared to submit to Your Honor on that point.

The Court: The only thing in question is the meaning of that phrase.

Mr. McCurtain: That is true.

The Court: Not a phrase in some other contract.

Mr. Schweppe: If I may make this observation, if [69] the court please, the authorities, going on the assumption of Your Honor's ruling, are very plain that in a case where evidence of custom is admissible, it is admissible only on the theory that the parties contracted with reference to it knowingly, and that it is part of their agreement. Now, obviously a custom with reference to some other agreement and not the agreement between the

(Testimony of R. J. Darling.)

parties cannot be relevant to the controversy. There is a very excellent decision in 112 Federal that brings that out.

The Court: The court has that view of the matter. You may in this instance ask him concerning what bearing if any any custom had upon the meaning the parties had in mind in using this language in this contract in question.

Mr. McCurtain: Very well, Your Honor.

The Court: That is the only objection of the defendant that is sustained, and an exception is allowed if an exception is preserved.

Q. (By Mr. McCurtain) Will you state, Mr. Darling, what is the custom of the trade with reference to the construction of a contract, having the language of the contract involved in this suit in mind?

Mr. Schweppe: I make the same objection.

Mr. McCurtain: He has already testified——

The Court: (interposing) He has not stated any particular provision nor has his attention been called to any particular provision. Point out that contract to the witness.

Q. (By Mr. McCurtain) I refer, Mr. Darling, to Exhibit No. 1, and call your attention particularly to the type- [70] written clause headed "General conditions," and ask you whether you are entirely familiar with the language of that clause?

A. Yes. I put a great deal of study on this, as in many other contracts which are worded somewhat differently; but still——

(Testimony of R. J. Darling.)

Mr. Schweppe: I object to testimony, if the court please, as to any other contracts which are worded differently.

The Court: That is sustained. You must respond to that particular language.

Q. (By Mr. McCurtain) You must limit your answers then, Mr. Darling, to the particular language here used, or in the contract you have in your hand. Then I will ask you again to state whether there is a custom with reference to that particular phrasing in contracts?

A. Well, I have read this over, and I can't see where it does anything but extend the time of shipment. It excuses delays——

Mr. Schweppe: (interrupting) If the court please, I move to strike the answer, because we are not asking the witness' construction of the contract.

The Court: That will have to be granted. It is so ordered stricken.

Mr. McCurtain: I think that that is correct, Your Honor.

Q. (By Mr. McCurtain) Look, Mr. Darling; the court rules that I must direct the inquiry, and you must limit your answer, to a question of whether there is a custom with respect to the particular language used in this contract [71] in suit?

A. I would say there is.

Q. You would say there is such a custom?

A. Yes.

Q. Then state, please, what that custom is.

(Testimony of R. J. Darling.)

Mr. Schweppe: I make the same objection, if the court please.

The Court: The objection will be overruled. Do you preserve an exception?

Mr. Schweppe: Yes.

The Court: Exception allowed.

A. I would say that delivery would have to be made after the causes——

Mr. Schweppe: (interrupting) If the court please, I move to strike that answer. We are not asking this witness' idea as to what he would say.

The Court: That is right. The motion is granted. It is stricken. Have in mind the form of the question, and answer that and nothing else.

Q. (By Mr. McCurtain) The question is, Mr. Darling, whether there is a custom concerning this particular language? A. Yes.

Q. And if so, what that custom is; not what you would say, but what that custom is.

Mr. Schweppe: I make the same objection, for the record.

The Court: The same ruling, the objection being overruled to that.

Mr. McCurtain: Now, will you read the question please? [72]

(The question was read by the reporter.)

A. The custom is that as soon as the causes for this delay are removed, the shipment must be made.

Q. (By Mr. McCurtain) And what, Mr. Darling, would you say as to the reasonableness of the

(Testimony of R. J. Darling.)

time, or how long a time would be allowed as reasonable after a delay of a strike of approximately three months?

Mr. Schweppe: May I put in the record one objection to this line of testimony, upon the ground that it is not admissible in evidence as violating the parol evidence rule with reference to the contract here in question?

The Court: You may note that objection again, and the court overrules it; but as made to this last question, that again does not come within the court's limitation. You are asking him something other than the custom, or he would be permitted to answer something other than the custom.

Mr. McCurtain: Perhaps that question can best be reframed by asking the witness another question then, Your Honor.

Q. (By Mr. McCurtain) Is there a custom, Mr. Darling, concerning a clause identical with this, as to how long would be allowed after the cessation of the impediment?

Mr. Schweppe: I make the same objection, if the court please.

The Court: The objection is overruled.

Mr. Schweppe: Exception.

The Court: You are asking now for the custom?

Mr. McCurtain: Yes, I am asking for the custom.

[73]

A. It would depend entirely upon the quantity involved and the conditions that prevailed after the strike or other impediment had been removed.

(Testimony of R. J. Darling.)

Mr. McCurtain: Now, if Your Honor please, for the purpose of the record I would like to offer to prove by this witness and others whom I have present in the courtroom what the general custom is as to this clause or clauses of similar import and tenor generally used in contracts throughout the trade. I know in advance under Your Honor's previous ruling what the ruling will be, but I would like to make that offer for the sake of the record.

The Court: The offer relating to the situation as to other or similar contracts is denied. You have already been allowed to inquire of this witness concerning the custom as applied to the particular provision in issue here.

Mr. McCurtain: You may cross examine.

Cross Examination

By Mr. Schweppe:

Q. Mr. Darling, how long have you been familiar with that contract form which you have in your hand, taken from Plaintiff's Exhibit 1?

A. We have shipped on that contract these shipments here. How many more, I could not say; some. Probably a year or two.

Q. Would you say that you had seen any of those contracts in that form prior to 1935?

A. No, I wouldn't.

Q. Now, since 1935 do you know of any condition of strike or [74] other condition falling within the terms of that contract which has raised the

(Testimony of R. J. Darling.)

question of performance after the date fixed in the contract for performance? Let me put it in another way. There was a longshoremen's strike in 1934, was there not? A. Yes, sir.

Q. There was a longshoremen's strike in 1936 and '37, between October and February?

A. Yes, sir.

Q. Now, aside from those two situations, do you know of any instance in which, under your testimony as to custom, delivery was ever made under that form of contract subsequent to the time specified for delivery in the contract? Are you specifically aware of any instance?

A. No, I am not.

Q. As a matter of fact, Mr. Darling, when you say that you believe there is a custom with reference to this particular clause, you are just giving your opinion about it, isn't that it?

A. Well, that is all I can do.

Q. Isn't it a fact——

A. (interrupting) I have been twenty-eight years in the export business.

Q. Isn't it a fact that you said you had given that clause considerable study? A. Yes.

Q. And that the statements you have here given on the witness stand are based on the study of that clause? A. That is right.

Q. Under this evidence of custom that you have testified to, [75] it is your idea that after the contract period specifically provided in the contract

(Testimony of R. J. Darling.)

has expired, for instance a contract specifying November shipment, that the buyer is required to take the merchandise in December or January?

A. No, sir.

Mr. Schweppe: That is all.

Redirect Examination

By Mr. McCurtain:

Q. Mr. Darling, did you have experience with this particular contract with the defendant concern in 1934, do you recall?

A. I couldn't be sure of that.

Q. You could not be sure of it? A. No.

Mr. McCurtain: That is all.

Mr. Schweppe: That is all, Mr. Darling.

(Witness Excused.)

Mr. McCurtain: I will call Mr. Haig.

NEIL HAIG,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCurtain:

Q. Your name is Neil Haig? A. Yes.

Q. What business are you engaged in, Mr. Haig? A. The lumber export business.

Q. How long have you been so engaged?

A. Since 1913.

(Testimony of Neil Haig.)

Q. And with what concerns?

A. W. L. Comyn, Douglas Fir Exploitation, Northwest Spruce, [76] and the Pacific Coast Spruce Company.

Q. How long were you with the Douglas Fir Exploitation Company?

A. Nine and a half years.

Q. And you are now engaged in the export business? A. Yes.

Q. With whom are you now engaged?

A. Pacific Coast Spruce Corporation.

Q. And your capacity with them? In what capacity are you engaged?

A. General manager.

Q. I hand you a contract which is a part of Plaintiff's Exhibit No. 1, and will ask you to read carefully the clause in printing which is labeled "General conditions" at the foot of the contract, so as to familiarize yourself with it.

A. (Witness refers to the exhibit in question.)

Q. Mr. Haig, have you familiarized yourself with the wording of the contract? A. Yes.

Q. I will ask you to state whether there is in the trade, namely, the export trade, a general custom or usage concerning the construction of that contract, that portion of the contract which relates to its performance being subject to delay, non-delivery and so forth, as affected by strikes or other causes enumerated there?

Mr. Schweppe: I make the same objection that

(Testimony of Neil Haig.)

I previously made with reference to the testimony of other witnesses relating to custom. It violates the parol evidence rule. I understand that you limited your ques- [77] tion particularly to this clause?

Mr. McCurtain: I undertook to do so.

The Court: The objection is overruled.

Mr. Schweppe: Exception.

The Court: Exception allowed. You may answer.

The Witness: Will you give me that question again?

(The question was read by the reporter.)

A. Yes, there is a custom.

Q. (By Mr. McCurtain) What is that general custom?

Mr. Schweppe: I make the same objection, if the court please, and ask an exception to Your Honor's ruling.

The Court: The same ruling, the objection being overruled and an exception allowed. What is the custom relating to that language or construction?

A. Well, the custom has been to make delivery of the goods contracted for after the period that was named in the contract, if a strike or other unforseen circumstance occurred that prohibited the seller from making delivery in the time specified.

Q. Is there any general custom as to within what time after the cessation of the strike or impediment that may be made?

Mr. Schweppe: I make the same objection, if the Court please.

(Testimony of Neil Haig.)

The Court: Overruled.

A. Well, there has been a custom of thirty days, but it has often been extended by mutual agreement between the buyer and the seller.

Q. Would the length of the strike or the length of the continuance of the impediment affect the custom? [78] A. Very possibly it would.

Mr. McCurtain: That is all, Mr. Haig.

Cross Examination

By Mr. Schweppe:

Q. Mr. Haig, I noticed you very carefully reading the language of that contract which you have in your hand, which is a part of Plaintiff's Exhibit 1. Have you seen that contract before?

A. Well, I won't say word for word, but it is extremely similar to a contract that I operated under for a considerable time.

Mr. Schweppe: If the court please, I now move to strike the testimony of the witness, because he now says that his testimony is not with reference to a contract word for word like this one but some other contract which the witness deems to be similar.

The Court: Well, I think he ought to be able to say, if he knows, what the custom is with reference to the provision there in question.

Mr. McCurtain: I understood him to so testify.

The Court: I did too, but now on cross examination he limits that.

(Testimony of Neil Haig.)

Mr. Schweppe: He limits it now to some similar contract that he is familiar with, not to this one.

Q. (By Mr. McCurtain) Are you familiar, Mr. Haig, with the contract used by Douglas Fir Export over a period of years? A. Yes.

Q. (By Mr. McCurtain) Can you point out to the court wherein this language differs? [79]

A. Well, that is extremely hard without the other one here.

Mr. McCurtain: I have a copy of that contract here which I propose later to introduce in evidence.

Mr. Schweppe: Well, if the court please, I still think that unless the contract is identical, it is not admissible.

The Court: I think that you may further examine this witness, and the court at this time will deny your motion to strike.

Q. (By Mr. Schweppe) All right. Mr. Haig, you have never bought any merchandise covered by the terms of the contract with that language in it from the Grays Harbor Exportation Company, have you? A. No.

Q. As a matter of fact you have been connected for a good many years with the Douglas Fir Exploitation Company, have you not? A. Yes.

Q. Which has been a competitor in the export field of the Grays Harbor Exportation Company?

A. I wouldn't say a competitor.

Q. To some extent? A. No.

Q. When did you first see that contract with that

(Testimony of Neil Haig.)

language in it, Mr. Haig? Have you seen it before today as far as you know now?

A. No, I don't think I have.

Mr. Schweppe: I renew the motion to strike the answers of the witness.

The Court: The motion is denied. The court will [80] consider the testimony given by the witness on both direct and cross examination.

Q. (By Mr. Schweppe) Well, having answered that question that way, I need not ask you whether you saw that contract prior to 1935; you did not of course? A. No.

Q. Are you aware now of any single instance where this custom that you have testified to with reference to the performance of a contract of the Grays Harbor Exportation Company with that clause in it has been carried out in the manner in which you describe? Can you think of a single one?

A. You mean contracts with the Grays Harbor Exportation Company?

Q. Yes. That is the one that has the clause in it concerning which the custom here is in question.

A. Well, I have had material tendered me with similar clauses.

Q. That is not the question, Mr. Haig.

A. Well, I can't say that the Grays Harbor Exportation Company——

Q. As a matter of fact you don't know now of any instance of custom with reference to the contract that you have in your hand and which you

(Testimony of Neil Haig.)

saw today for the first time, do you? You do not know of any instance of custom with reference to that contract, do you?

A. I know of similar instances.

Q. With reference to contracts of the Grays Harbor Exportation Company?

A. Oh, no; with similar contracts. [81]

Mr. Schweppe: Well, I renew the motion to strike.

The Court: The motion is denied.

Q. (By Mr. Schweppe) You do not now have any present knowledge of any instance of customary performance with reference to any contract of the Grays Harbor Exportation Company having that clause in it, do you? A. No.

Mr. Schweppe: That is all.

Mr. McCurtain: I think, while we are on the subject with this identical witness, Your Honor, I will make another offer.

Redirect Examination

By Mr. McCurtain:

Q. I will hand you a blank contract, having across the face of it "Douglas Fir Exploitation & Export Company," which has been marked by the clerk of this court as Plaintiff's Exhibit 12 in this case for identification, and will ask you to read and study the general conditions printed in that form of contract, and state to the court—well, first I will have you read it and then I will interrogate you.

A. Yes, I am familiar with this clause.

(Testimony of Neil Haig.)

Q. You are familiar with that clause? Is that the same clause that was used and the same form of contract that was used on C. I. F. shipments by Douglas Fir for the number of years you were with them? A. Yes. This was a similar clause.

Mr. McCurtain: Now, if Your Honor please, I will say to Your Honor and to counsel that the only distinction between this clause and a verbatim copy of the [82] clause of the contract in suit, it is a verbatim copy of this with one exception only. The word "war" is not included in the general specifications—there are some eighteen general causes—and in one instance they use an expression "their" instead of "the seller." So that I say to Your Honor as a member of the Bar that the clause is identical in all respects, word for word and comma by comma, and i-dotting and t-crossing with the contract in suit, with that one exception; and I offer to prove by the witness that there was a custom and usage established in this particular locality over a long period of years using this identical contract with that one exception, which I argue to Your Honor entitles me to interrogate the witness concerning this and the custom under it; because I say in all sincerity to Your Honor that the elimination of that one word "war" has nothing to do with the construction of it on strikes whatsoever, and I offer this exhibit in evidence with that explanation of it.

Mr. Schweppe: I object to the introduction of this exhibit in evidence on various grounds. The first is

(Testimony of Neil Haig.)

that testimony of custom with reference to a contract by another contract is entirely incompetent, irrelevant and immaterial, being transactions between other persons and customs with reference to business done by some one else.

I next object to it on the ground that—and I have not had a chance to study it in detail—but to the extent that the language of that contract varies from the contract here in question, of course the testimony as to custom with reference to this contract would not be admissible here. [83]

In the third place, I object to it upon the ground that this again is an attempt to violate the parol evidence rule by evidence of custom.

And finally, I object to it upon the ground that there is no evidence as yet as to when this contract was in use by the Douglas Fir Exploitation Company, whether this year, last year, or the year before, or five years ago, which would have a material bearing upon the testimony of this witness as to whether or not any evidence concerning this contract by this witness is admissible in evidence. Personally I do not know.

Your Honor agrees with the theory that the evidence of custom is admissible only to the extent that it may be admissible to show what the particular parties contracted with reference to it. He is testifying with reference to a custom about another agreement with another company. It seems to me that unless it is established that the custom with reference to this agreement was a general custom

(Testimony of Neil Haig.)

which all of the parties knew, it would not be admissible in evidence. I therefore make the objection that it is incompetent, irrelevant and immaterial for the specific reasons that I have given. It is a contract between other persons.

Mr. McCurtain: I only expect the exhibit to be used, if Your Honor permits it to be introduced, for the purpose of testimony concerning the one clause.

The Court: Concerning the custom with reference to it?

Mr. McCurtain: With reference to this one clause.

The Court: It is offered upon that condition?

[84]

Mr. McCurtain: It is offered on that condition, that there is no single change at all in the general text; and the only difference is that "war" has been inserted in the defendant's contract, and war is not inserted in the general conditions clause here; and that in all other respects save that, and that is this contract the language is "beyond their control," whereas in the contract in suit the language is "beyond the seller's control," they have substituted "seller's" for "their", and left "war" out; so that to all intents and purposes it is an identical contract.

The Court: Does this contract refer to buyer and seller?

Mr. McCurtain: Yes, this refers to buyer and seller, and they use the expression "their" instead

(Testimony of Neil Haig.)

of "seller"; but "their" and "seller" of course are synonymous as far as the contracts are concerned. I offer it for the purpose of showing—and I want to call attention to one mistake I think Mr. Schweppe made in his argument—the witness did testify as I understood him—I am sure I am right on that—that this is the form used by this company for the many years he was with it.

The Court: That is about what he testified to.

Mr. McCurtain: In substance he said that.

The Court: I do not recall whether he was with the company during the time that the defendant's contract was outstanding or supposed to be in effect, or not.

Q. (By Mr. McCurtain) What years were you with this Douglas fir?

A. I left Douglas Fir the 15th of February, 1936. [85]

Q. And this contract, as I understand it, this form of contract with this general conditions clause, was in effect for a period of years prior to that?

A. It was in existence at the stevedore strike, the big strike.

The Court: Of '36 and '37?

The Witness: No, the one prior to that.

Mr. McCurtain: 1934.

The Court: What about 1936 and '37? Do you know whether or not it was in effect at that time, used generally at that time by the trade?

The Witness: That contract would be used generally at that time.

(Testimony of Neil Haig.)

Mr. McCurtain: I will undertake to show, Your Honor, that the contract was in use during all of the time, and it is in use now.

Recross Examination

By Mr. Schweppe:

Q. May I ask one question? Isn't it a fact, Mr. Haig, that this form of contract of the Douglas Fir Exploitation Company grew out of the big stevedore strike of '34? A. No, I don't think so.

Q. You don't think so. A. No.

The Court: The court will suspend ruling upon the admission of that exhibit in evidence, but the court will rule that you may inquire of him at this time with reference to the custom of the trade in construing that particular phrase contained in Exhibit 12. [86]

Redirect Examination

By Mr. McCurtain:

Q. Now, Mr. Haig, remembering that that contract that I have in my hand is Exhibit 12, I will ask you to state whether there was and is a custom concerning shipments under this clause in the contract, Exhibit 12, a general custom in the trade over a period of years where performance has been delayed by strike or other cause mentioned in this general clause, whether there is or is not such a general custom?

(Testimony of Neil Haig.)

A. There is a general custom under that clause.

Q. And what is your testimony as to what that general custom is?

A. The contracts were filled after the strike, after the strike was over, were filled in a reasonable time.

Mr. McCurtain: You may cross examine.

The Court: Do you offer it now after the witness has testified?

Mr. McCurtain: Now I offer that contract in evidence.

Mr. Schweppe: I make the same objection, if the court please.

The Court: The objection is overruled. The court admits that Plaintiff's Exhibit 12 to characterize and illustrate this witness' testimony, to show what the testimony was with reference to.

(Plaintiff's Exhibit 12, contract, admitted in evidence.) [87]

(Part of
PLAINTIFF'S EXHIBIT 12)

Douglas Fir Exploitation and Export Co.

MEMORANDUM OF AGREEMENT

L. General Conditions:

All conditions of Export Schedule....., whether or not before enumerated, to be mutually binding on Buyer and Seller.

Delivery and/or shipment of material under this contract, is subject to acts, requests, or commands

(Testimony of Neil Haig.)

of the Government of the United States of America in time of war or national emergency and Sellers are not liable for delay or non-shipment, or for delay or non-delivery, if occasioned by acts of God, civil commotions, destruction of mill if named, fire, earthquakes, epidemics, diseases, restraint of princes, floods, snow, storms, fog, droughts, strikes, lockouts, or labor disturbances, quarantine, or non-arrival at its due date at loading port of any ship named by the Sellers or from any other cause whatsoever, whether or not before enumerated, beyond their control, or for any loss or damage caused by perils usually covered by insurance or excepted in bills of ladings, or for outturn. Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned causes, if so required by Sellers, provided delay does not exceed 30 days. The conditions of usual Charter Party and/or Bills of Lading are hereby accepted by the Buyers and the same are hereby made a part of this contract, save that said conditions shall not limit the exceptions above enumerated.

Should the ship named to carry lumber under this contract be lost, then the Sellers are to have the option of substituting another ship or ships within 30 days after the period named above, or of cancelling this contract. Goods to be shipped under and/or on deck at Seller's option. [200]

(Testimony of Neil Haig.)

Recross Examination

By Mr. Schweppe:

Q. Now, Mr. Haig, did the Douglas Fir Exploitation Company make any C. I. F. contracts with shippers in the Orient? A. Yes.

Q. Isn't it a fact that most of the shipments made by Douglas Fir Exploitation Company were simply cost and not freight during the time you were with that company?

A. Not in the department I was in. Mine was purely C. I. F., or cost and freight.

Q. Isn't it a fact the major business of the Douglas Fir Exploitation Company was cost and not freight?

A. You mean were F. A. S. sales?

Q. F. A. S. sales, free alongside ship, without any commitment as to the freight contract?

A. Yes, the major portion of the business.

Q. Yes; now, when you were testifying as to custom that you believe to exist with reference to Plaintiff's Exhibit 12, what you are testifying to, I take it, is what the Grays Harbor Exportation Company did pursuant to that contract in one or more instances that you know about, isn't that right?

The Court: You mean Douglas Fir?

Q. (By Mr. Schweppe) Douglas Fir Exploitation Company I mean?

A. Well, I am referring to the particular—when I take that clause, I am referring in particular to

(Testimony of Neil Haig.)

the contracts that were delayed during the big stevedore strike and were afterwards completed.

Q. They were afterwards completed, and your testimony is [88] based entirely upon the fact that the Douglas Fir Exploitation Company, after what you call the big strike, which was the longshoremen's strike of 1934, did complete some of those contracts? A. Completed them all.

Q. All right, completed them all; and your testimony is based entirely on that fact?

A. That is it.

Q. In other words, your testimony is based on the fact that that is what that company did?

A. What it has been customary to do.

Q. That is what they did, isn't that right? Isn't that the whole basis of your testimony, that you think it was a custom to do it under that contract, that that is what that company did after the big strike? A. It was a custom.

Q. I did not ask you that. I said, you are basing your testimony upon the fact that that is what that company did after the big strike?

A. That is what they did.

Q. Is it your idea, Mr. Haig, that after the contract period has expired, having a clause in it such as the one you refer to, that the buyer must accept the merchandise?

A. The buyer is generally anxious to accept.

Q. Well, you did not answer my question, whether he must legally accept it on a falling market.

(Testimony of Neil Haig.)

Mr. McCurtain: I think, if Your Honor please, that calls for a legal opinion of the witness. He is testifying what the custom is.

The Court: Well, it is cross examination. [89]

Mr. McCurtain: Now he is asking him what he thinks the legal liability is under the contract.

The Court: It is cross examination. The objection is overruled.

Q. (By Mr. Schweppe) Mr. Haig, you have been in this business a long time you say. If you have a contract with some buyer in the Orient that calls for half a million feet for November shipment, the contract containing a clause such as this Douglas Fir Exploitation Company contract that you have identified, is it your idea that if a strike supervenes throughout the month of November and ends let us say the first of January, that the buyer has to take that shipment, even though the market is falling, on the first of January? Is that your idea of what the custom is?

A. In my experience, in the majority of the cases, they have taken it.

Q. Well, that does not answer the question. I am exploring the extent of this custom. You say it is the custom that the shipper must ship. Now, I ask you whether it is the custom that the buyer must take after the contract period has expired? In other words, can the buyer come to me and say, "Well, you did not ship that during November; I took it on the basis of prevailing mercantile prices

(Testimony of Neil Haig.)

during that month. I do not want it in January, because I can buy it cheaper somewhere else." It is not your idea that he has to take it after the time of the contract has expired, is it?

A. If the thing was delayed, you would tell him about it. He might elect to take it, and he might not. [90]

Q. Would he have to take it in your opinion under this custom that you speak about? He would not have to, would he? You know from experience that he does not, isn't that it?

A. No, I don't. I know of cases where they have taken it, and I know of cases where they have not taken it. In Great Britain they wouldn't take it.

Q. Then you would not say that it was customary, that it is part of this custom that the buyer has to take, would you?

A. I still think he has got to take it.

Q. You still do? That is your opinion about it? What about the custom that you have reference to? Now, isn't it a fact, Mr. Haig,—let's get down to the practical manner of doing business—isn't it a fact that whenever the contract period specifically stipulated by the parties has expired, that you call up the other party and make a new engagement with reference to that shipment, isn't that right? You call them up about it after the contract has expired? You find out if they still want it, isn't that what you do?

A. Yes, in substance that is what you do.

(Testimony of Neil Haig.)

Q. Yes. In other words, although the contract period has expired, you make a new agreement with reference to the taking of that shipment after the contract is over?

A. You generally make it before the contract period expires.

Q. You make a new agreement, do you not, for shipment after the contract period? A. Yes.

Mr. Schweppe: That is all. [91]

Mr. McCurtain: That is all, Mr. Haig.

(Witness Excused.)

Mr. McCurtain: I will call Mr. Force.

L. E. FORCE,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCurtain:

Q. Will you please state your full name?

A. L. E. Force.

Q. What is your business, Mr. Force?

A. I am president and general manager of the Douglas Fir Export Company.

Q. For how long have you occupied that or had that position with this corporation?

A. I have been general manager since 1928, and president for the last five years.

(Testimony of L. E. Force.)

Q. What previous experience have you had prior to 1928 in the export business of lumber?

A. I have been with this present company since 1919.

Q. And had you any experience prior to that time in this line?

A. For about eight or ten years prior to that I was with the exporting firm of Hind-Rolph & Company in San Francisco.

Q. Are you familiar with the clause which I show you on Plaintiff's Exhibit 2, the contract used by the Grays Harbor Exportation Company, the general conditions?

A. I can say I am not familiar with it because I have never seen it.

Q. Will you examine it please, Mr. Force? [92]

A. I don't know whether I can without my glasses.

Q. I can give you, with the court's permission, a copy that is in large print.

Mr. McCurtain: Will the court permit me to give the witness this one?

The Court: If opposing counsel does not object, the court does not.

Mr. Schweppe: I have no objection. You say that that is an identical copy of it?

Mr. McCurtain: Yes.

Mr. Schweppe: All right.

Mr. McCurtain: May I state to the court and for the record that the copy I now hand the witness is a verbatim copy of the clause?

(Testimony of L. E. Force.)

Mr. Schweppe: Of the general conditions that are set forth in Plaintiff's Exhibit 2?

Mr. McCurtain: Yes. Plaintiff's Exhibit 2 and all the others.

The Court: The witness seems to have finished reading the copy.

Q. (By Mr. McCurtain) Are you familiar with that language now, Mr. Force?

A. I would say that it is very similar to one that is used by us, but I would not say that it is verbatim.

Q. I hand you now, Mr. Force, Plaintiff's Exhibit 12, which you of course will identify as one furnished by you; and I say to you that that contract is word for word with the contract that you have just examined, with this exception: That in the contract Exhibit No. 12 the word "war" is not included in the general exception clause, and that there has been a change in the expression [93] "beyond their control," this one reading "beyond the seller's control"; and with the exception of those two words, there is no variance in the contracts whatsoever.

A. You are telling me there isn't?

Q. I am telling you there is not, and you may for the purpose of your testimony rely upon that. Now, I ask you to state, Mr. Force, whether this clause in Exhibit 12, being your contract, has been in general use in this community for sales C. I. F., and if so for how many years?

(Testimony of L. E. Force.)

A. I can only say as to its use by our own company.

Q. How long has that form been used by your company for C. I. F. shipments?

A. Since 1924.

Q. Now, during that fourteen years, Mr. Force, has a custom grown up, or is there a custom as to the obligation of the seller to deliver subsequent to the time fixed for the delivery by the contract when such timely delivery has been delayed because of a strike or other causes mentioned in the clause?

A. I would not want to say that there is a recognized custom. I know what we do.

Q. What has your company done over the fourteen year period you have been using it?

Mr. Schweppe: I object to any testimony unless the testimony is to custom.

The Court: That objection is sustained in view of the witness' preceding statement.

Mr. McCurtain: I would like to ask one more question of the witness.

The Court: You may do so. [94]

Q. (By Mr. McCurtain) How many mills, Mr. Force, does your organization sell the output of, of how many mills in the northwest?

A. We sell the export production, or that proportion of their production that goes to export, of seventy mills located in the States of Oregon and Washington.

Mr. McCurtain: Now I suggest to Your Honor

(Testimony of L. E. Force.)
that that is sufficient to establish a custom in this vicinity.

The Court: Well, I cannot accept that as being conclusively determined. You may inquire of the witness further along any proper line that you may think advisable.

Mr. McCurtain: No, I only expect to be able to show by this witness, Your Honor, as to the experience of this company selling for these seventy mills; and he is not prepared to testify further than that. I should like, however, to again offer, Your Honor, to prove the common custom or general usage under this and similar contracts, which is in line with Your Honor's former refusal.

The Court: The matter as already restricted will have to stand. This witness, like the other one, may be permitted to state what the custom is.

Mr. McCurtain: I respect Your Honor's ruling on the matter, but I simply want to make my record clear on that.

The Court: Objection sustained.

Mr. McCurtain: That is all, Mr. Force.

Cross Examination

By Mr. Schweppe:

Q. Mr. Force, how long did you say you had been the execu- [95] tive head of the Douglas Fir Export Company?

A. I have been general manager since 1928.

Q. You were general manager at the time, or a considerable portion of the time when the last wit-

(Testimony of L. E. Force.)

ness who was on the stand, Mr. Neil Haig, was employed by your company? A. Yes.

Q. You were the general manager?

A. From 1928 on, yes.

Q. You are not aware of any custom with reference to the performance of the contract of the Grays Harbor Exportation Company, the defendant here, are you? A. No, sir.

Mr. Schweppe: That is all, Mr. Force.

(Witness Excused.)

Mr. McCurtain: I will call Mr. Dant.

CHARLES E. DANT,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCurtain:

Q. Your name is Charles E. Dant?

A. Yes, sir.

Q. What relation do you bear to the plaintiff, Mr. Dant?

A. Well, I am president of Dant & Russell.

Q. What experience have you had and over what period of years in the exporting of lumber and other products generally from the Pacific Coast and elsewhere?

A. Well, we got into the export business about 1908, and have been in it actively ever since.

(Testimony of Charles E. Dant.)

Q. I will ask you to examine the language used as shown by plain- [96] tiff's Exhibit 1, and call your attention particularly to the general conditions clause in the contract attached as a part of that exhibit? A. I am familiar with this.

The Court: You have read it over many times and know what he is asking about?

The Witness: I have read it over several times, yes.

Q. (By Mr. McCurtain) I also hand you Plaintiff's Exhibit 12 for identification—I believe that was introduced, Your Honor?

The Court: It was. It was received in evidence.

Mr. Schweppe: Solely as illustrative of the witness' testimony as I recall.

The Court: Yes, to illustrate that witness' testimony.

The Witness: Yes, I read this over last night.

Q. (By Mr. McCurtain) You have studied this also, and you know of the difference between this contract and the other one, the exact wording?

A. It is identical excepting that word "war" I think.

Q. Now, Mr. Dant, I will ask you whether there is a general custom and usage in the trade concerning the performance or obligation to perform contracts containing the clauses to which I have just directed your attention, where delivery on the date specified in the contract is rendered impossible by reason of strikes or other impediments mentioned there? A. Yes.

(Testimony of Charles E. Dant.)

Mr. Schweppe: I object to the question, if the [97] court please, renewing first the objection on the ground of the parol evidence rule, and secondly the question is not limited solely to the contract of the Grays Harbor Exportation Company.

Mr. McCurtain: Well, I will separate that if Your Honor prefers.

The Court: Yes.

Mr. McCurtain: I asked him as to the two.

The Court: Do that.

Q. (By Mr. McCurtain) I will ask you first, Mr. Dant, then, whether you are familiar with or whether there is in fact a general custom and usage concerning the language under the general conditions clause of what I showed you as Exhibit 1, being the Grays Harbor contract in suit, as to the fulfillment of shipments delayed or rendered impossible because of a strike or other impediment mentioned in the general clause of that contract?

A. Yes.

Mr. Schweppe: I make the same objection, if the court please, on the ground of the parol evidence rule.

The Court: The objection is overruled.

A. Yes.

Q. Will you now state what that custom is please?

A. Well, there is a general custom on the Pacific Coast and all over the world that in the case of strikes or other impediments which delay a ship-

(Testimony of Charles E. Dant.)

ment, that that shipment will be made within a reasonable length of time after those difficulties are removed.

Mr. Schweppe: If the court please, I now move to strike the answer upon the ground that the answer [98] plainly indicates that it is not testimony as to custom with reference to this particular clause.

The Court: Either counsel may inquire for more specific detail of the witness. The witness' answer will stand.

Q. (By Mr. McCurtain) Now I ask you, Mr. Dant, whether there is a custom generally understood and known to the trade and usage covering shipments delayed under the clause as shown by Exhibit 12, namely the Douglas Fir clause where such shipments are delayed beyond the date specified for performance in the contract because of strikes or other impediments specified in the general clause?

Mr. Schweppe: Do you mean the Grays Harbor or Douglas Fir?

Mr. McCurtain: I am speaking now of the Douglas Fir. He answered about the Grays Harbor.

Mr. Schweppe: I make the same objection that the answer would be incompetent, irrelevant and immaterial, evidence of custom with reference to another contract between other contracting parties.

The Court: Read the question please, Mr. Reporter.

(Testimony of Charles E. Dant.)

(The question was read by the reporter.)

The Court: The objection is overruled.

Q. (By Mr. McCurtain) Will you answer, Mr. Dant? A. Yes, there is a general custom.

Q. Now, state what that *question* is.

A. Well, that custom would be to ship within a reasonable length of time, as soon as possible within a reasonable length of time. [99]

Q. And is there any measure as to any reasonableness of that time which is generally understood in the trade?

A. It depends on conditions. It might be that space would be available immediately, or it might be a month or two months or three months; and I would say that we have sometimes had much longer than that.

Q. Now, have you had actual experience there under either or both of these particular contracts concerning which I have interrogated you other than the instance in suit?

A. We have had actual experience, yes.

Q. And what has been that actual experience?

A. Well, usually—the question is confusing. The question never came up with anybody. They always ship. It never came up with the Douglas Fir, and we never expected it to come up with the Grays Harbor Exportation Company.

Q. Have you purchased during the last twelve or fourteen months from Douglas Fir any considerable quantity of timber or logs or lumber under their C. I. F. contract which is the one here?

(Testimony of Charles E. Dant.)

A. No, not under the C. I. F. contract.

Q. Not under this contract?

A. But I purchased many millions of dollars worth from them where we arranged the freight ourselves.

Mr. McCurtain: That I think that should be stricken, Your Honor.

Mr. Schweppe: I move to strike that.

The Court: It may be stricken.

Mr. McCurtain: I think that should be stricken.

Q. (By Mr. McCurtain) What do you say, Mr. Dant, as to whether the custom concerning which you have testified, [100] and as affecting both these contracts as shown by these exhibits, is generally known and understood throughout the trade, throughout the world or the Pacific Coast?

Mr. Schweppe: I make the same objection.

The Court: Overruled. Read the question please.

(The question was read by the reporter.)

A. Yes, it is generally known with everybody in the trade.

Q. Did you have, Mr. Dant, or did your firm to your knowledge have any contracts with the Grays Harbor in which this clause was used other than the present case, or those where lumber was shipped to Hong Kong? A. Yes.

Q. What were those contracts?

A. Well, they were some contracts for lumber which they shipped.

(Testimony of Charles E. Dant.)

Q. Well, are you not now referring, Mr. Dant, to those that were introduced in evidence this morning? A. Yes.

Q. Did you have any others than those?

A. We have had a good many of them.

Q. To your knowledge was any information furnished to you or any of the employees of your firm, concerning the question of whether the Grays Harbor would ship under these contracts, prior to approximately March 6 or 7?

A. That was the date we were up here?

Q. No. That is the date when the letter came in asking the eighty seven and a half cent increase.

A. We had no knowledge before that.

Mr. McCurtain: You may inquire. [101]

Cross Examination

By Mr. Schweppe:

Q. That is, you mean by that last answer that you had no knowledge of it?

A. No, I had no knowledge.

Q. You do not know what knowledge anybody in your organization had?

A. I was watching it very closely.

Q. What you are testifying to at the moment is what you knew about it?

A. What I knew, yes.

Q. Do you recall, Mr. Dant, seeing the contract form which is Plaintiff's Exhibit 1, the one you said you had read a number of times, prior to 1935?

(Testimony of Charles E. Dant.)

A. Have I seen the Grays Harbor form?

Q. Yes. Do you know whether the Grays Harbor had that form prior to 1935?

A. I don't know, no.

Q. You do not recollect seeing it prior to that time, do you? A. No.

Q. Now, to your knowledge the first time any question has arisen under the general conditions of this contract, which is Plaintiff's Exhibit 1, is by reason of the existence of the longshore strike of 1936 and '37, isn't that right?

A. What is that question?

(The question was read by the reporter.)

A. You mean that the first time that we had occasion to go into this matter? [102]

Q. That is right.

A. Yes, was when they refuse to ship.

Q. That is the first time you knew of any issue arising about it?

A. Yes, that is about the first time.

Q. Mr. Dant, having in mind your evidence as to the custom of the shipper's obligation to ship after the contract period specified in the contract has expired, is it also a part of this custom, according to your conception, that the buyer must take after the contract has expired?

A. No, sir. He does not have to.

Q. The buyer does not have to take?

A. Not if his contract has run out. He usually does take.

(Testimony of Charles E. Dant.)

Q. If the time has run out, he does not have to take? A. No.

Mr. Schweppe: That is all, Mr. Dant.

Mr. McCurtain: I want to be clear that that is in the record, Your Honor.

Redirect Examination

By Mr. McCurtain:

Q. To sum up the situation, it is your contention as a matter of custom with relation to this contract, and other similar contracts, that the buyer has a certain option which is not accorded to the seller? A. Yes, sir.

Mr. McCurtain: Now, if Your Honor please, I hope you will not misunderstand me. I mean to show the court every deference in its ruling, and I know the sincerity of the court; but I would like to have this witness answer a general question, which I know in advance Your [103] Honor will overrule in accordance with your previous ruling; but in order that I may be sure my record is entirely clear on it, I should like to ask Mr. Dant this question, whether it is a custom generally in the export trade that clauses such as the clauses disclosed by Plaintiff's Exhibits Nos. 1 and 12, and providing generally that the deliveries are subject to and conditioned upon no liability against the seller by reason of the acts enumerated in those and similar clauses, where the strict performance at the time specified in the contract is pre-

(Testimony of Charles E. Dant.)

vented or rendered impossible by reason of strike or other enumerated causes, whether it is not under such contracts a general trade custom and practice well-known and understood throughout the trade generally, not only in the northwest but on the Pacific Coast and throughout the World, that such clauses, whatever may be their particular wording, are generally under the custom construed to mean that the seller is obligated to deliver within a reasonable time after the removal of the impediment or the cessation of the strike, if that be the cause.

Mr. Schweppe: I make the same objection that I previously made, if the Court please.

The Court: That objection is sustained.

Mr. McCurtain: I understand, Your Honor, and I would like an exception.

The Court: Exception allowed.

Mr. McCurtain: That is all, Mr. Dant.

Recross Examination

By Mr. Schweppe:

Q. I might ask you one question. Isn't it a fact with [104] respect to the lumber involved in these particular shipments, that Dant & Russell resold to the Orient without a comparable clause in the sales contract? Isn't that right?

A. No one would buy from us if we—we have a clause all right, but it would be—if we took the same stand that——

(Testimony of Charles E. Dant.)

Q. (interposing) You do not have a clause like this in your contract?

A. We have a very similar clause, yes; but our clause is a little clearer. It is a little clearer. It was copied from the United States Steel Corporation, and it is a little fuller.

Q. I have no objection to your going into that, but what I am trying to find out is whether or not in the contracts of shipment that you had with the Orient, with respect to the buyers in the Orient and with respect to the subject matter of these unfilled contracts, you sold with or without a clause protecting you in the event of inability to obtain delivery by reason of strike or other cause over which you had no control?

A. We were fully protected.

Mr. Schweppe: That is all.

(Witness Excused.)

The Court: At this time we will take a five minute recess.

(Recess)

Mr. McCurtain: I should like, Your Honor, to call Mr. Herber, the defendant, to the stand. [105]

J. P. HERBER,

called as an adverse witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCurtain:

Q. Your name is J. P. Herber?

A. Yes, sir.

Q. What relation do you bear, Mr. Herber, to the defendant in this case, the Grays Harbor Exportation Company?

A. I am the general manager.

Q. And have been for a period of years?

A. I have been for several years, yes, sir.

Q. Now, I direct your attention, Mr. Herber, to the clause of your contract, the contract of your company, bearing your signature, and which is attached as a part of Plaintiff's Exhibit 1; and I direct your attention to the general conditions clause, with which of course I assume you are entirely familiar? A. Yes, sir.

Q. Please state to the court whether it is a fact that you had at the time of the occurrence of the strike, the longshoremen's strike in 1936, several contracts with concerns other than the plaintiff, which contracts called for C. I. F. shipment delivery by you, at a fixed contract price with specified delivery dates of lumber or logs, which contracts were evidenced by contracts in all respects identical with the exhibit you have just examined, except for the names and amounts and so forth;

(Testimony of J. P. Herber.)
that is to say the general conditions clause was used?

Mr. Schweppe: I object to this testimony as to contracts with concerns other than the plaintiff, on [106] the ground it is incompetent, irrelevant and immaterial, contracts between other parties, and having no bearing on the issues here.

Mr. McCurtain: In fairness to the court, I want to state the purpose of the inquiry. I propose to show, if permitted, by the witness, that the defendant concern did have contracts identical in all respects insofar as the clause in controversy here is concerned, with others; and did fulfill those contracts at the contract price, the periods running several months after the cessation of the strike; for the purpose of showing a construction of the contract in suit by the defendant concern itself. I profess, Your Honor, that it may seem a novel way of getting at it, but I want to offer to prove that by this witness, the general manager of the company.

Mr. Schweppe: If the court please, I sensed perhaps that that was the purpose for which counsel was going to offer this evidence, and I will specify the objection a little further on this ground, and that is this: The rule which counsel invokes as to the construction of the parties to a contract, that is, the practical construction is a rule, as I read the authorities, confined to the practical construction by the parties themselves, based either

(Testimony of J. P. Herber.)

on that contract or upon a prior contract between the same parties having the same language in it. Frankly there may be a case on the subject, but I have been unable to find any case where what one contracting party does with reference to a third person not a party to the controversy, where other considerations might be operative, has any bearing upon the [107] practical construction of the parties; because the practical construction rule is not the construction of one party; it is the practical construction by both parties, because a construction by one party not assented to by the other party is not within the rule. I therefore renew the objection on the ground that the attempt here is to show contracts between the defendant and third persons, those contracts not being in any particular in issue here.

The Court: Do you wish to call the court's attention to any authorities?

Mr. McCurtain: Counsel has very correctly stated the purpose and intent of the question, and I must confess to Your Honor that I did not have a case directly in point.

The Court: What the parties did with reference to this contract between themselves might be admissible; but what one of the parties did with some other person with reference to some other contract would not be admissible. For that reason I sustain the objection.

(Testimony of J. P. Herber.)

Mr. McCurtain: Very well, Your Honor. With that we rest.

The Court: Do you wish to inquire?

Mr. Schweppe: You rest?

The Court: Plaintiff rests.

Mr. Schweppe: I might just as well continue Mr. Herber on the stand as the first witness for the defense.

The Court: You are then calling Mr. Herber as defendant's first witness?

Mr. Schweppe: I will call Mr. Herber as defendant's [108] first witness.

J. P. HERBER,

recalled as a witness on behalf of the defendant, being previously duly sworn, testified as follows:

Direct Examination

By Mr. Schweppe:

Q. Handing you, Mr. Herber, Plaintiff's Exhibit 1, in which is included a contract form of the Grays Harbor Exportation Company, that happening to be a contract with Dant & Russell, Inc., and calling your particular attention to the form of that contract and the printed provisions thereon, I ask you, Mr. Herber, how long the Grays Harbor Exportation Company has been using that form of contract?

(Testimony of J. P. Herber.)

A. Immediately following the longshoremen's strike of 1934.

Q. Will you state whether or not your use of this contract grew out of that strike?

A. It did.

Q. Did you prior to that time have any such clauses, any such general conditions in the contract as are contained here? A. No.

Mr. McCurtain: I object. I would like to move, Your Honor, on the ground that the witness answered before I could make the objection, to strike that last answer.

Mr. Schweppe: I am perfectly willing that the record can be considered as my question just having been stated before the witness' answer, so that he can make his objection.

Mr. McCurtain: I see no competency in that question. What they had before this contract was in use is fairly comparable to the evidence you excluded from my side, Your [109] Honor.

The Court: It seems to me it ought to be excluded, Mr. Schweppe; and it is ordered that that question about what contract provided for, and the answer to it, being "no," shall be stricken. It is so ordered.

Mr. Schweppe: It is not particularly material.

Q. (By Mr. Schweppe) This particular form has been in use since that strike?

A. Yes, sir.

(Testimony of J. P. Herber.)

Q. Not prior thereto? A. That is right.

Q. Now, Mr. Herber, when Mr. Connolly, the Seattle agent of the plaintiff, was on the stand, he testified that he did not have any recollection of having any conversation with you on or about January 11, 1937, with respect to the cancellation of space and your company's position that it would not go forward with the contracts. I ask you, Mr. Herber, whether or not on or about January 11 you called Mr. Connolly to your office and had a conversation with him? A. I did.

Q. What was the substance of that conversation?

A. I advised Mr. Connolly that the steamship companies with whom we had contracts had refused to reinstate their freight contracts, the contracts that had been cancelled earlier; and inasmuch as they refused to reinstate those contracts, we would not be able to reinstate our contracts which were no longer in force after the strike.

Q. You fixed the date of that conversation with Mr. Connolly as January 11, 1937. How do you fix that date, Mr. Herber? [110]

A. I fixed it from the memorandum book in which I keep a record of all calls on my daily transactions. In other words I keep a record of all calls during the day pertaining to business.

Q. In this book which you have handed me, which I will show to counsel—I do not wish to introduce it in evidence—will you describe what this

(Testimony of J. P. Herber.)

memorandum book is? What is that book that I have in my hand, and which I have just showed to Mr. McCurtain for examination, which has a legend on it, "December '36," and some other date in '37?

A. It is a record book, a daily record book that I keep, have been keeping for many years, which I post all calls, all engagements, all inquiries that come in as regards lumber, logs, or space, simply as a matter of record that there will be no one overlooked, that all matters are attended to during the day. We get many calls; and if we didn't keep a record of them as they come in, why we would not be able to keep track of them.

Q. And it is from this memorandum book that you have refreshed your recollection as having had a conversation on the date mentioned with Mr. Connolly? A. Yes, sir.

Q. With reference to the Dant & Russell contracts? A. Yes, sir.

Q. Now, Mr. Herber, some evidence has been attempted to be offered as to what is the custom of the export trade with reference to the general conditions contained in the contract which is part of Plaintiff's Exhibit 1, which a contract of the Grays Harbor Exportation Company. Will you state whether or not there is any custom to the effect [111] that it is the seller's obligation to make delivery under that contract of your company after the specific contract period fixed in the contract has expired? A. I know of no such custom.

(Testimony of J. P. Herber.)

Q. As a matter of fact, Mr. Herber, until the plaintiff in this case in their reply pleaded——

Mr. McCurtain (interrupting) I suspect, Your Honor, that this question is likely to become leading, if counsel continues in his present vein.

The Court: It is quite leading.

Mr. McCurtain: I object to the form of the question if it is continued in that way.

Q. (By Mr. Schweppe) Do you know of any custom with reference to your contract form which I introduced in evidence of the character that I outlined? A. No.

Q. At the time these contracts were entered into between your company and Dant & Russell, Inc., the contracts which are here sued on, did you have in mind any such custom as that which has been suggested here in this court today?

A. I did not.

Q. You did not even know about it?

A. I didn't know about it.

Mr. Schweppe: I think that is all.

Cross Examination

By Mr. McCurtain:

Q. Mr. Herber, I direct your attention to what I believe to be the page you looked at in this record book, and to the fact that under the heading or the date January 11 you have marked "Connolly (D. & R.)", and then there are some [112] hiero-

(Testimony of J. P. Herber.)

glyphics which I do not understand. Is that shorthand or just a check mark? A. Just marks.

Q. Then you mark "D. & R." again. I have read the full note so far as that date is concerned, have I not? A. Yes.

Q. Is there anything in that which suggests to your mind what you talked about on that date?

A. Yes, sir.

Q. What? A. I recall——

Q. (interrupting) No, I am not asking you what you recall. I am asking you what there is in this data, made in your own handwriting, which reads, "Connolly (D. & R.)" and "D. & R.", which suggests to your mind what you talked about?

A. Yes, sir.

Q. What? What is there in the note that directs your attention to any particular conversation?

A. It confirms that I did have a conversation with him, because it is check-marked there.

Q. That I grant you, but is there anything in the book kept by yourself which indicates the subject of that conversaton or what was said at it by either of you?

A. Re Dant & Russell contract. It states "D. & R. contract".

Q. Where do you see anything about contract? That says "D. & R." doesn't it? A. Yes.

Q. This says—I read it again for the sake of the record—the book states, "Connolly; contracts D. & R.", then a check mark indicating you say

(Testimony of J. P. Herber.)

nothing, "D. & R. Inc." [113] Now, I ask you again what there is in that book record that indicates to you what was said by either you or Connolly on that date, if anything?

A. Well, the memorandum in the book is merely confirmation or a reminder that I talked to Mr. Connolly on that date about the Dant & Russell contract situation.

Q. But there is nothing in the note to indicate that?

A. There is nothing there that outsiders could see.

Q. There is nothing to indicate that you might not have talked about a future sale to Tsingtau?

A. The strike was on and there were no future sales being talked about.

Q. The strike was on during that period? Now, is it not true that during that strike period, you talked to Mr. Connolly a number of times?

A. I think we talked to Mr. Connolly three or four times during that October 28 period to February 1.

Q. Can you find any other reference in this book to those conversations, or anything to remind you of the time you talked with him?

A. Yes, I can, if we had the book prior to this book.

Q. Now, does this book contain the February dates, immediately following the month of January?

(Testimony of J. P. Herber.)

A. If my memory serves me right, we had no more conversations with Mr. Connolly until he came into the office with Mr. Dant.

Q. That would be March 18? That would be March 18, when I was there? A. Yes, sir.

Q. That was March 18? [114]

A. And there was Mr. Collins from Shanghai.

Q. Mr. Collins from Shanghai?

A. That is correct.

Q. Now, is it not true, Mr. Herber, that you talked with Joe Connolly, the representative of this plaintiff concern, at least a dozen times?

A. No, that is not correct.

Q. Is it not true that you talked with him several times between February 5 and March 18?

A. Several times.

Q. Have you any record in the book of any of those conversations?

The Court: I believe an undue amount of time is being consumed by the witness in that answer. Can't you ask him some other question?

Mr. McCurtain: I think I can, Your Honor.

A. It may be that Mr. Connolly called at your office, and our conversation was in Mr. Young's office, of which I kept no record.

Q. Mr. Herber, you heard Mr. Connolly's testimony this morning, did you not, that he saw you with considerable frequency, two or three times a week, between February 5 and March 5, which would make several calls? He talked with you, and

(Testimony of J. P. Herber.)

you showed him on one or more occasions copies of telegrams from the Klaveness Line agents, and discussed with him the delay in shipment under these contracts? You heard that testimony, did you not? A. Yes, sir; I heard it.

Q. Do you dispute that you had those conversations that he mentioned? [115]

A. I had one or two conversations with Mr. Connolly, but not two or three conversations during one week.

Q. In the one or two that you had, subsequent to January 11 and prior to March 18, did you at any time mention to Mr. Connolly that you did not expect to perform these contracts?

A. Yes, sir; I did.

Q. What did you say to him about it?

A. I referred back to the conversation I had with Mr. Connolly on January 11.

Q. You considered that January 11 conversation a very important conversation, did you?

A. That was a conversation that we had with regards reinstatement of our contracts that were no longer——

Q. (interrupting) You considered that conversation a very important one, did you not?

A. Yes, sir; Mr. Connolly was Dant & Russell's representative, and I merely advised him what to expect, and asked him to so accordingly advise his Portland people.

Q. You had on three days previous written a long letter to Dant & Russell in which you detailed

(Testimony of J. P. Herber.)

with considerable certainty and detail the reasons that you were not going to fulfill those contracts, did you not?

A. That is a form letter we sent all the shippers.

Mr. McCurtain: I will ask to have the question read, Mr. Reporter, and I would like a yes or no answer.

(The question was read by the reporter.)

A. I did.

Q. Will you give the court the best explanation you can of why you did not send the letter which bears date January [116] 8, and which is shown in Plaintiff's Exhibit 11?

A. This is a form letter, Your Honor, that counsel advised us to send all shippers to Shanghai. Similar letters were addressed to the Robert Dollar Company, H. R. McMillan Export Company, The East Asiatic Company, and were mailed to them on the following day. This particular letter was not mailed.

The Court: Addressed to whom?

A. Addressed to Dant & Russell, Inc., Portland, because I wanted to first consult Mr. J. W. Lewis, the general manager of the Willapa Harbor Lumber Mills, who was furnishing the cargo, with whom the contract was placed, about furnishing cargo if it was agreeable to him to reinstate these contracts at the original contract price. I took the letter with me to Grays Harbor and to Willapa

(Testimony of J. P. Herber.)

Harbor several days later and handed it to Mr. Lewis, and he read it, and he stated as far as they were concerned, the order was cancelled. I put the letter in a folder that I carried papers back and forth to the harbor, and when I got back to Seattle I put that folder in a mailing rack and it lay there several weeks before we discovered it. I called Mr. Schweppe and asked his advice on whether or not it was necessary to mail this letter, since I had a conversation with Mr. Connolly; and he said it was immaterial, under our contract it was not necessary to mail—not absolutely necessary to mail those at this time.

Q. So that is your explanation of why you did not give notice to the plaintiff of your election to cancel the contracts, that you were not certain whether you would do [117] it until you talked to others concerning the freight, is that true?

A. It was not a question of concerning the freight. It was a matter concerning the supplier of the logs, whether or not he was agreeable to reinstating the old contract at the old price.

Q. That is, for the purchase of the logs?

A. Yes.

Q. Well, there were plenty of logs available, were there not, in February, at the old contract price?

A. I wouldn't say there were plenty available. Some were available, yes.

(Testimony of J. P. Herber.)

Q. Several millions of feet, were there not? Many more than enough to fill this contract were available, were they not?

A. I can't say that.

Q. Do you deny that?

A. I can only say as far as our own supply is concerned. We don't buy logs in the open market.

Q. Did you seek to buy them in the open market? A. No.

Q. Now, you considered this matter of cancellation of grave importance, and had been advised by your counsel as to the sending of letters, and you had written a letter to this plaintiff and had carried it back and forth with you to Grays Harbor several times, had you not?

A. No, I didn't carry it back to Grays Harbor several times, just once. I took it down there and consulted Mr. Lewis on the log question, and brought it back with me; and I inadvertently placed it in a file instead of the [118] outgoing mail.

Q. And you thought you had mailed it?

A. I thought I had mailed it.

Q. Then why did you call Mr. Connolly over on the 11th to tell him you were going to cancel the contracts if you had already notified the plaintiff in writing?

A. When I spoke to Mr. Connolly, I didn't know the letter was in my possession.

(Testimony of J. P. Herber.)

Q. No, you thought you had mailed it. That is why I asked you why, if you thought you had mailed this letter of explanation cancelling the contracts under the advice of our counsel, you thought it necessary to make an oral conversation with the local agent of Dant & Russell on the same subject?

A. I didn't get your question.

Q. I will repeat it. You have just stated under your oath to this court that you believed this letter had been mailed as of approximately January 8th, 9th or 10th, and that you had inadvertently left it in your file and had not mailed it, that is true, is it not?

A. To be frank with you, the letter was written on the 8th, and that was on Friday. I did not proceed to Willapa Harbor until the following week, or after my conversation with Mr. Connolly.

Q. Well, now, you had in mind the sending of the letter, and that was of prime importance, was it not, in your mind, sufficiently so at least that you talked to your counsel and associates and your log supply. Why, then, having reduced it to writing, would you give the oral statement to a local representative instead of sending [119] it in to the home office?

A. I say I gave the advice to Mr. Connolly, who was the representative of Dant & Russell, with whom the deal had been concluded.

Q. After having written a letter?

A. After having dictated a letter, but not hav-

(Testimony of J. P. Herber.)

ing submitted it at that time to Mr. Lewis. The following week I proceeded to Willapa Harbor.

Q. And then you did submit the letter to Mr. Lewis?

A. I submitted the letter to Mr. Lewis.

Q. And what did Mr. Lewis have to do with it?

A. Mr. Lewis stated that as far as they were concerned, this contract was cancelled.

Q. What relation is he to your company?

A. We are their export representative.

Q. And he is the logger who supplies you with the logs?

A. He is the logger that supplies us with the logs.

Q. So that then the contracts were to be cancelled because of the log supply, and not on account of the delay of the strike, is that so?

A. Not necessarily, no.

Q. Well, is it partially so?

A. Partially so, yes.

Q. The fact is that you now tell the court, as I understand you, that the reason you did not perform under the contracts was because your log supply failed you, is that correct?

A. That is not entirely correct.

Q. Well, how far is it correct?

A. The only reason I consulted Mr. Lewis in the matter was [120] that I wanted to see what disposition he had made of the logs that he had on hand.

(Testimony of J. P. Herber.)

Q. And he told you that he had already sold them to somebody else?

A. He told us that it was not necessary, he would not conclude this contract two or three months hence. At that time it was still indefinite as to just when the strike would be settled.

Q. And then did you seek a supply elsewhere?

A. I intended to mail the letter when I returned to Seattle and I failed to do so inadvertently.

Q. And that would have been on the 12th or 13th perhaps? A. It was a week later.

Q. Now, do you recall the date when I came with Mr. Dant and Mr. Collins from Shanghai to your office from Portland, to your office in Seattle, and we discussed the matter?

A. Yes, I do.

Q. Do you recall me asking you or your counsel at that time if you intended to repudiate the contracts to please say so in writing?

A. I can't recall.

Q. Isn't it a fact, Mr. Herber, and do you not now recall that at that conversation in your office on March 18, 1937, both Mr. Dant of my client concern, and myself, pressed you to say whether you were repudiating these contracts, whether you were refusing to perform these contracts, and asked you to call in your stenographer if you did not intend to do so and so state in writing, and you refused to so state? [121] A. I refused, yes.

(Testimony of J. P. Herber.)

Q. So that on March 18, two or three weeks after you had made the so-called February shipment, you still refused to confirm in writing your refusal to make good under the contracts, did you not?

A. I felt it was unnecessary. The contracts stood on their own merits. The buyers had been advised that we could not reinstate them.

Q. The only advice we had had up to that date was the advice you gave orally, you say, on January 11, to Mr. Connolly? I call your attention, Mr. Herber, to a letter sent you on February 25, which would be some twenty days after the strike had ceased, over the signature of Mr. Darling, the vice president and executive manager of my client concern, and direct your attention to the language of the letter in which it states—by the way, to be fair with you, this answers your letter of February 24, in which you advised Dant & Russell that you now had on the line for shipment 4609-4 our CX549, and also contracts our numbers CX2813 and 14 and 2858, which were due October and November of the previous year. Do you recall writing that letter? Obviously you do. You knew of its going out, didn't you? A. I assume so.

Q. You assume that you did, and Mr. Sanborn had authority to write it, did he not?

A. Yes, sir.

Q. And you were familiar with his work?

A. Yes.

(Testimony of J. P. Herber.)

Q. And had charge of the office? [122]

A. Yes.

Q. I now direct your attention to your answer under date of February 25, in which we ask you to advise us about number 510, which was due about four months before the strike ended. Do you recall receiving that letter?

A. This letter concerns a space contract and not a square contract.

Q. All right, I direct your attention to the particular language: "You might also inform us as to our order CX510 covering 500,000 feet hemlock logs for Shanghai." Do you recall receiving that letter?

A. Yes, sir; I recall receiving it.

Q. Why didn't you answer it?

A. Would you please clarify just which order that covers?

Q. Yes, I would be happy to do so. CX510, your order number 4566, both mentioned in that letter, refer to a shipment of one million, 500,000 still undelivered, to Shanghai, for October-November and November-December, your option. There is the contract, Exhibit 2.

A. The contract was no longer in force.

Q. Why didn't you so state in answer to that business inquiry from the purchaser when he asked for information about it? Did you consider it of no importance?

(Testimony of J. P. Herber.)

A. We simply were advised by counsel that it was not necessary to answer the letter.

Q. Do you mean to tell me that you, after having——

Mr. Schweppe (interrupting) What letter are you referring to?

Q. (By Mr. McCurtain) I am referring to the letter of February 25, which letter I showed you a moment ago. You [123] said it referred to the other contracts, until I called your attention to the CX510, and then you asked me what that meant. You say you took that up with your counsel, and he told you not to answer it?

A. I took the matter up as regards all contracts that had expired.

Q. Let's be fair, Mr. Herber; I ask you, do you now say to this court that you took the question of answering this letter of February 25 up with your counsel? A. Yes, sir.

Q. And what did your counsel tell you?

A. He advised that it was not necessary to answer the letter in regard to contracts that were not in force.

Q. And did that advice appeal to you as fair business?

A. Well, we had discussed the question of expired contracts when you were present.

Q. Oh, no; I am talking about February 25, long before I was present, long before we came up here and then asked you again, would you keep

(Testimony of J. P. Herber.)

your contracts. I am talking about February 25. Let me show it to you again. You say on your oath here that you told Mr. Connolly January 11 that you would not fulfill, and that was long before the strike ended; and you say also on your oath that you thought you had mailed the letter of January 8? A. That is right.

Q. Now, then, I say if that be true, why didn't you answer the plain business inquiry of my client under date of February 25, almost a month before the conference in Seattle?

A. I can't answer that question except as I have already **[124] answered you.**

Q. Very well. You have made your only answer to that? Now, I ask you, Mr. Herber, why it is that you say to this court that you considered these contracts all of them void after January 8, when you conferred with your counsel, why it is that on February 24, you stated that you were going to ship the contracts which were due the previous October for lumber to Hong Kong?

A. The Hong Kong contracts had no bearing on the Shanghai.

Q. They are in identical language, are they not? They contain the same strike clause, do they not?

A. We never put an order on the line that has already expired without getting the buyer's permission to ship it.

Q. All right, when did you get the buyer's permission to ship the CX2813, 14, or CX2858?

(Testimony of J. P. Herber.)

A. We gave them the advice and followed it up by a line-up, which you have there, and there was no objection to it.

Q. Wait a minute. Do you say that this letter of yours of February 24 sought our advice as to whether we would accept it?

A. It says here, "confirming our verbal advice to Mr. Connolly yesterday."

Q. And we on the next day asked you what was happening to 510, in answer to that letter, and thanked you for your advices about 2813 and 14, did we not?

A. All I can say, counsel, is that we assumed that our contracts stood on their own merits, and it wasn't necessary to answer your letter.

Q. And you considered that 2813 and 14 were still in force, [125] and you so notified us?

A. The letter was to confirm advice to Mr. Connolly that we were taking the buyer's orders. We assumed that Mr. Connolly agreed to it. I can't go into details at this late date, because many of the details are handled by others in the office.

Q. And you considered those contracts in full force and effect, namely those mentioned in your letter?

A. Only subject to buyer's approval.

Q. And you considered your number 4609, number 4, our CX549 mentioned in the letter as in effect, did you not?

(Testimony of J. P. Herber.)

A. We didn't until we advised the buyer that we could make shipment, and the buyer stated that they had to complete their order. We stated we could.

Q. When did the buyer state they had to complete their order? Do you find any such language in any of the correspondence?

A. It specifically states here "confirming our verbal advice to Mr. Connolly yesterday." I assume we advised Mr. Connolly we would and could make shipment, and he agreed to accept it.

Q. Then why on March 6th, after the logs were aboard the vessel, did you ask us to pay eighty-seven and a half cents additional freight by your letter of March 6, if you considered the contracts confirmed and asked us to make a new contract?

A. We advised Dant & Russell that we would complete the contract——

Q. (interposing) By verbal agreement on January 11 you advised them, and that is all the advice, isn't it?

A. We didn't advise them on January 11 that we would complete [126] the contracts, because the strike was still in effect and no one could tell when the strike was going to end.

Q. And you told them then on January 11 orally the deal was off?

A. We told them January 11 that unless our freight contracts were reinstated, we could not re-

(Testimony of J. P. Herber.)

instate our contracts that were no longer in force.

Q. All right. Now, you just give this court the best explanation you can why it is that you sought by your letter of March 6 to get Dant & Russell to pay eighty-seven and a half cents more than the contract price? Give the court the best explanation you can think of.

A. Because that was the understanding with all shippers, that——

Q. (interrupting) Now you are talking about a custom, aren't you?

A. No; on these particular contracts.

Q. With whom did you have such an understanding with all your shippers as far as Dant & Russell are concerned?

A. Well, we simply advised all the shippers that we could reinstate certain contracts at an increase.

Q. Do you say anything about reinstating that contract there?

A. Well, we referred again to our advice of February 24, where we stated that we could make shipment.

Q. You said they were on the line-up ready for shipment. You didn't say you could make shipment. You said they were being lined-up for delivery to the hold of the vessel on February 24, did you not?

A. We say "confirming our verbal advice to Mr. Connolly, the following orders for your account are on the line-up at [127] the vessel."

(Testimony of J. P. Herber.)

Q. What does that mean? Explain to the court what "on the line-up for the vessel" means? That means they are on the dock ready to be put in the hold?

A. Not necessarily. It is simply an advice that they are on the line-up for a certain ship.

Q. And what does "line-up" mean?

A. "Line-up" as expressed in lumber shipping, on steamship lines is a detail of the cargo as it is to be shipped.

Q. The pieces counted and so forth?

A. No, just order numbers and a general description of the cargo; no piece tally or anything.

Q. In other words when you say it was on the line-up for delivery, you meant you had it in mind to deliver it? Had you done more than that in preparation?

A. I assume that we advised Mr. Connolly that we could have this Hong Kong cargo, and that we could make shipment on board this vessel.

Q. And you assume that? A. Yes, sir.

Q. All right then, I will assume it also. Having assumed that, do you mean that you are ready to go ahead and complete that contract?

A. If they want the cargo.

Q. They answered and said, "We thank you very much for your advice, but what about CX510, the previous shipment?"

A. That had expired. It was no longer in force.

(Testimony of J. P. Herber.)

Q. Oh, you, under advice of counsel, did not so tell them; you just let it ride and said nothing?

A. That is correct. [128]

Q. So then on March 6 you asked them to pay eighty-seven and a half cents differential by your letter of March 6? You asked them to stand eighty-seven and a half cents additional freight, did you not? A. That is correct.

Q. And they told you on the 8th that they would not do it? A. That is correct.

Q. In effect?

A. That is correct. I waived the extra cost.

Q. You waived it and shipped at the contract price?

A. That is correct. That contract was still in force after the strike.

Q. Now, on March 18 you handed to me, as counsel for the plaintiff, a letter of January 8, that is correct, is it not?

A. That is correct, a copy of a letter.

Q. And did you not at that time advise Mr. Dant and myself that you would, within a week, state in writing whether or not you would fulfill these contracts by the end of that current week?

A. I think that is correct.

Q. Did you do so? A. Yes, sir.

Q. Will you show me where you so advised us? Isn't it a fact, Mr. Herber, that you did not so advise us, and that Wednesday of the following week we wrote you and asked you why you had not

(Testimony of J. P. Herber.)

done so by the letter you find there of March 24?

The Court: Answer the question if you can, Mr. Herber. [129]

A. We answered your request on March 29.

Q. After receiving our letter of the 24th, which called your attention to the fact that you had not kept your previous bargain to answer during the current week, isn't that true?

A. It says here, "the writer was absent from the city the best part of last week, and your letter was brought to his attention this morning. That accounts for the delay."

Q. That refers to the letter of March 24, does it not, from Dant & Russell?

A. That answers Dant & Russell's letter of the 24th.

Q. Let me phrase it this way, Mr. Herber; is it not a fact that on March 18, long after you now say the contracts were of no further effect, you declined in your office to commit yourself in writing on the proposition? A. I did.

Q. That is to say, you did refuse to commit yourself? A. I refused to commit myself.

Q. Mr. Herber, you testified in answer to your counsel's question in substance that you took advice from counsel and concluded about January 8 that you were not liable under these contracts, and so notified your various buyers who had contracts with you, did you not? A. That is correct.

(Testimony of J. P. Herber.)

Q. That is correct, is it not?

A. Yes, sir.

Q. I now ask you whether it is not a fact that subsequent to that time, and subsequent to the strike, you did not ship to Balfour Guthrie & Company approximately three-quarters of a million under similar contracts, at the contract [130] price?

Mr. Schweppe: I object to that, if the court please, because the court has already sustained one objection as to any performance that this defendant might have entered into with a third person.

The Court: Well, this is cross examination, and the objection is overruled. Answer whether you did or not. A. By special——

Q. (By Mr. McCurtain, interrupting) I will reframe it. I ask you if it is not true that subsequent to the strike you billed to Balfour Guthrie's branch of this city, under contracts identical insofar as the printed form is concerned, several contracts covering 742,043 feet of lumber at the contract price?

Mr. Schweppe: I renew the objection, if the court please.

The Court: The objection is overruled.

Mr. Schweppe: Exception.

The Court: Exception allowed.

A. We did by special arrangement.

Mr. McCurtain: That is all.

The Court: At this time we will take an adjournment of these proceedings until tomorrow at 10:00 in the forenoon. Court is adjourned until that time.

(Whereupon an adjournment was taken until 10:00 o'clock A. M. Wednesday, October 5, 1938, at which time proceedings were resumed as follows:)

The Court: You may proceed in the case on trial. I believe Mr. Herber was on the stand. [131]

Mr. Schweppe: Have you any further examination of Mr. Herber?

Mr. McCurtain: No.

The Court: Do you desire any further questions of Mr. Herber?

Mr. Schweppe: No, I am not asking Mr. Herber any further questions. I want to call Mr. Connolly for a question or two.

The Court: Mr. Connolly has already been sworn. You may proceed.

JOE J. CONNOLLY,

called as an adverse witness on behalf of the defendant, being previously duly sworn, testified as follows:

Direct Examination

By Mr. Schweppe:

Q. Mr. Connolly, isn't it a fact that on or about January 4, 1937, as a representative of Dant & Russell, you attended a meeting of Seattle shippers

(Testimony of Joe J. Connolly.)

which was called for the purpose of seeing whether or not the steamship companies serving exporters on thePacific Coast, including Grays and Willapa Harbors, could be induced to reinstate the contracts?

A. That is true. I don't recall the exact date, but about that date.

Q. You were present at that meeting as a representative of Dant & Russell? A. Yes.

Q. And the meeting was called of course because the steamship companies had cancelled their space? A. That is true. [132]

Mr. Schweppe: That is all.

Cross Examination

By Mr. McCurtain:

Q. Mr. Connolly, do you recall what statements, if any, were made by Mr. Harber of the defendant concern at that meeting, concerning his obligations to fulfill contracts?

A. I don't recall any statement that Mr. Herber made personally, but Mr. Herber was, I would say, the guiding light in that organization of exporters. The argument was made very strongly to the steamship companies that we, as exporters, were bound to ship our contracts; and that, with that in view, we petitioned and pled with the steamship company to reinstate their contracts. The argument was brought out that irrespective of whether the steamship companies cancelled their

(Testimony of Joe J. Connolly.)

contracts or not, we, as exporters, were bound to ship our lumber. The statement was further made, and it was attempted when the steamship companies appeared to be a little hard to deal with, it was requested that each and every exporter cable his principal in Japan—this particular meeting dealt only with business to Japan—that each and every exporter cable his agent in Japan to the effect that unless certain things were done with regard to these contracts, that there would be a mass repudiation of these contracts. It was deemed absolutely necessary that every exporter cable such information. This was very difficult to do because there were several exporters, including ourselves, who were not willing to send such cables.

Q. Now, Mr. Connolly, you heard Mr. Herber's testimony here yesterday to the general effect that he notified you on [133] a certain date as I recall it, asking you whether your concern would reinstate the contracts which are our numbers 2813 and 14, and subsequent numbers, concerning the shipment of lumber to Hong Kong. Was any such statement ever made to you by Mr. Herber?

A. Such language was never used in connection with those contracts.

Q. When, Mr. Connolly, was the first date when you received any information from Mr. Herber or anyone else connected with the defendant concern to the effect that they were likely to repudiate these contracts?

(Testimony of Joe J. Connolly.)

A. The first few days in March. I don't recall the exact day; around the 5th, 6th, or 7th of March.

Q. Do you recall whether that came by way of a letter approximately March 6 addressed to Dant & Russell, in which the request was made for additional freight?

A. That is the first intimation we had that anything was wrong.

Q. And what then was subsequently done about the question as to reinstatement or confirmation of the contracts?

A. Well, the result of that, my advice to my principals, was this meeting held in Seattle between yourself, Mr. Dant, Mr. Collins of Shanghai, Mr. Schweppe and Mr. Herber.

Q. That is the meeting of March 18 when I came up? A. The meeting of March 18.

Mr. McCurtain: That is all.

Mr. Schweppe: That is all.

(Witness Excused.)

Mr. Schweppe: I will call Mr. Young. [134]

WILLIAM J. YOUNG,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Schweppe:

Q. Mr. Young——

The Court: (interrupting) Will you have him state his name for the record?

(Testimony of William J. Young.)

Q. Will you state your name please?

A. William J. Young.

Q. By whom are you employed, Mr. Young?

A. I am auditor and traffic manager of the Grays Harbor Exportation Company.

Q. How long have you been employed by that company? A. Since July of 1928.

Q. Referring now first to a memorandum which I hand you, I ask you whether or not you acted as the secretary of a meeting on or about January 4, 1937, called for the purpose of inducing the steamship companies serving Pacific Coast Lumber Shippers, including Grays Harbor and Willapa Harbor, to reinstate shipping contracts previously cancelled? A. Yes.

Q. Did you act as the secretary of that meeting? A. Ex officio, not officially.

Q. Did you make any memoranda at that time concerning the time and date of the meeting and the persons present? A. Yes, sir; I did.

Mr. McCurtain: We will admit, Mr. Schweppe, that Mr. Connolly was present at that meeting.

Mr. Schweppe: All right, thank you. [135]

Q. (By Mr. Schweppe) Now, Mr. Young, referring to the date of January 11, 1937, do you have any memorandum in your files, in your own personal files, showing a conversation on that date with Mr. Connolly? A. I have.

Q. Will you produce it please? For the purposes of the record will you describe the book which you have in your hand?

(Testimony of William J. Young.)

A. This is a day book that I keep of all calls, or all transactions that go through my hands during the course of the day.

Q. With reference to the date of January 11, what does your daily memorandum book show?

Mr. McCurtain: Just a moment please. I object to any further testimony as to the conversation of January 11, for the reason and on the ground that Mr. Herber yesterday testified that as late as March 18, some weeks after the strike had ended, he at that time refused to commit himself as to the fulfillment of these contracts or their repudiation; so that whatever notice he may have given or claims to have given orally to Mr. Connolly on January 11 would have no binding effect here.

Mr. Schweppe: As a matter of fact I think the record shows right in the letter file that, at least as to March 18, you were advised as to the position of the Grays Harbor Export Company, isn't that right?

Mr. McCurtain: Yes, on March 18 the record also shows that I asked Mr. Herber in your presence whether he would state, and either sign this letter of which he gave me a copy, or commit his company in writing; and he [136] refused to do so, and he so admitted on the stand.

The Court: It may be that the question put is improper, to have him state what the record shows. If he wants to state what he knows, that is another matter.

(Testimony of William J. Young.)

Mr. Schweppe: I think that is proper criticism of the question.

Q. (By Mr. Schweppe) Mr. Young, what did occur on January 11 with reference to any conversation with Mr. Connolly, according to your own personal knowledge?

Mr. McCurtain: I renew the objection.

The Court: The objection is overruled.

A. Early in the morning, about the first thing in business, Mr. Herber came out and told me to—

The Court (interrupting): No.

Q. (By Mr. Schweppe) No, tell what happened with respect to Connolly, not what Mr. Herber told you.

A. I called Mr. Connolly and asked him to come over to our office.

Q. You called him? A. Yes, sir.

Q. At whose instructions?

A. Mr. Herber's.

Q. Do you have any further notations in your daily memorandum book as to further conversations had with Mr. Connolly?

A. Yes, I have.

Q. Will you just give those dates if you can, having first refreshed your memory, if that is necessary?

A. If I may step down here, it will save time. (Witness procures a document). Subsequent to January 11, on January 23, January 27 and February 17. [137]

(Testimony of William J. Young.)

Q. What is your recollection as to those dates which you have just named?

A. The one on the 23rd I couldn't say.

Q. The 23rd of what?

A. The 23rd of January. I couldn't say exactly what the discussion was. It may have been a telephone conversation, or it may have been that Mr. Connolly was in the office. On January 27 it was a discussion regarding quotations on Japanese specifications, having no bearing on this case. On February 17 he called and asked when and if we were going to ship the logs.

Mr. McCurtain: Pardon me, Mr. Young; don't you mean February 15?

The Witness: February 17 according to my book.

Mr. Schweppe: The 17th I am quite sure, because that is the figure he gave me this morning.

Mr. McCurtain: All right.

The Court: As far as I recall you have not asked this witness what transactions he had, if any, with Mr. Connolly.

Mr. Schweppe: I am about to ask him that, if the court please.

Q. (By Mr. Schweppe) Did you personally have any conversation with Mr. Connolly?

The Court: Starting on a certain date, January 11, for instance.

Q. Did you have any conversation with Mr. Connolly on January 11?

(Testimony of William J. Young.)

A. January 11 was to ask him to come over to our office, no further conversation. [138]

Q. What conversation did you have with him on the next date named? A. I couldn't say.

Q. What conversation did you have on the next date named?

A. That was a discussion of quotations on Japanese specifications, new business.

The Court: New business, as to which this lawsuit has no concern?

The Witness: No.

Q. That is right; and what was your conversation on the next date named?

A. Mr. Connolly asked me when and if we were going to ship the logs.

Q. And what did you say?

A. I couldn't give him an answer, because I had to refer that to Mr. Herber, who was out of town at the time.

Q. How long have you been in the export business, Mr. Young? A. Since October of 1927.

Q. You have been continuously connected with the business of exporting lumber to the Orient and other parts of the world? A. Yes, sir.

Q. Mr. Young, I hand you Plaintiff's Exhibits 7, 8, and 9, which purport to be contract files and shipment data between Grays Harbor Exportation Company and Dant & Russell, and ask you to tell the court about the transactions shown there.

(Testimony of William J. Young.)

A. Exhibit No. 7 is a contract for a hundred thousand feet of Hong Kong boards, 50,000 feet for shipment October, 50,000 for shipment in December. It is covered by Dant [139] & Russell's contract number 2813, C2813.

Q. Will you state for the record when those shipments were made?

A. They were made on the motorship Granville the 5th day of March, 1937.

Q. That was after the strike was over?

A. Yes, sir. That is Exhibit No. 7.

Q. Take the next one.

A. Exhibit No. 8 is our order——

Mr. McCurtain: Mr. Young, your one number covers our two numbers. That is the reason you are confused.

A. Oh, I see. This would be one-half of the order I just gave the particulars of.

The Court: Speak again of the particulars you stated in connection with Exhibit 7?

A. This is part of our order number 4624, and it is Dant & Russell's order number C2814, covering 50,000 feet of Hong Kong boards, shipped on the M.S. Granville, March 5, 1937.

The Court: Is that a new contract or an old contract?

The Witness: It is an old contract. It is part of our contract number 4624, dated October 7.

Q. (By Mr. Schweppe) Just for the purpose of informing the court, will you go a little further and

(Testimony of William J. Young.)
point out to him the date of the contract and what shipment period it called for?

A. The date of the contract was October 7, and the shipment was 50,000 feet October, 50,000 feet December. Exhibit No. 9 is our order number S4647, Dant & Russell's C2858, [140] calling for 50,000 feet of Hong Kong boards for shipment in the first half of November, 1936. The date of our contract is October 19, 1936. It was finally shipped on the M.S. Granville March 4, 1937.

Q. You have covered all those exhibits, 7, 8 and 9? A. Yes.

Q. Now, Mr. Young, will you state whether or not the shipments made under those contracts, or the shipments of the merchandise described in those contracts, was made pursuant to any additional conversations with reference to those shipments or otherwise? A. Yes, sir; it was.

Q. Will you state what the fact about those shipments is in that respect?

A. I think it was February 23, when we were going over our records and making up line-ups, these orders were studied.

Mr. McCurtain: Just a moment. I object, if Your Honor please, to what was done by these people in their own office, unless he shows something that was said to the plaintiff here.

Q. (By Mr. Schweppe) Will you state, Mr. Young, whether or not you had a conversation with Mr. Connolly on or about February 23?

(Testimony of William J. Young.)

A. Yes, I did.

Q. With reference to these Hong Kong shipments? A. Yes, sir.

Q. Will you state what that conversation was?

A. We informed him that we were prepared to make shipment of these contracts on the motorship Granville, and asked for his authority to do so.

[141]

Q. Did you consider his consent necessary?

A. Yes.

Mr. McCurtain: I object to that question, if Your Honor please.

Q. (By Mr. Schweppe) Well, let me ask you this then; why did you ask Mr. Connolly?

A. Because the shipment period of the contracts had expired, and we wouldn't dare ship an order on a contract without first getting the authority of the buyer.

Q. I refer you now, Mr. Young, to a letter dated February 24, 1937, which is one of the letters contained in Plaintiff's Exhibit 11, and ask you what bearing that letter of February 24 has on the Hong Kong shipments?

A. This is a letter that I gave to our stenographer to confirm a conversation with Mr. Connolly on the previous day concerning these orders, notifying him that we were definitely lining them up for shipment on the M.S. Granville.

The Court: What is the date of that?

The Witness: February 24, 1937.

(Testimony of William J. Young.)

Q. (By Mr. Schweppe) One further question about these Hong Kong orders. Were these shipments made to Hong Kong, which were covered by Exhibits 7, 8 and 9 and this additional conversation you had with Mr. Connolly on February 23, were those shipments for which you got space at any increased cost over the freight commitment originally made? A. No, sir.

Mr. McCurtain: I object to that as incompetent, Your Honor, irrelevant and immaterial. [142]

Mr. Schweppe: Well, I think it is quite material. These people are relying on these contracts as a matter of construction. I think we are entitled to show that it did not cost anything to go through with these particular contracts.

The Court: The objection is overruled.

Q. (By Mr. Schweppe) Will you state whether or not the shipment of these three contracts to Hong Kong, Exhibits 7, 8 and 9, required any additional outlay over that originally contracted for in those contracts? A. They did not.

Q. Now, Mr. Young, referring to Plaintiff's Exhibit 1, part of which is a contract dated September 1, 1936, between Grays Harbor Exportation Company and Dant & Russell, Inc., on a form of the Grays Harbor Exportation Company, and directing your attention particularly to the general conditions that are printed at the end of that contract, I ask you whether there is or whether you know of any custom in the export business with reference to

(Testimony of William J. Young.)

shipment under that clause which you have before you in that Exhibit 1?

A. In what way? I don't understand you?

Q. I say, does there exist any custom, or do you know of any custom with reference to shipment under that clause? A. No.

Mr. Schweppe: You may cross examine.

Cross Examination

By Mr. McCurtain:

Q. You say there is no custom concerning shipments under that clause? [143] A. No.

Q. Why then did you ask the consent of the buyer to ship under it?

A. The contracts had expired, and we had to get their authority to ship, asked them if they wanted the cargo, and they did, and we got their authority to ship.

Q. Do you understand that you can change a written contract or renew it by an oral notice that you are about to ship under it?

Mr. Schweppe: He is asking him a question of law. The witness can testify what he actually did.

The Court: Well, it is cross examination. If he knows the answer, there is no reason why he can't give it. A. No, I don't know that.

Q. (By Mr. McCurtain) Now, would you have shipped these shipments of lumber had the freight rate been increased? You said you shipped them at no additional cost to yourselves; would you have

(Testimony of William J. Young.)

shipped them had that freight cost been increased?

A. Under certain conditions.

Q. What conditions?

A. The exporters had absorbed the increase in freight.

Q. You mean to say if the purchaser would absorb the increase in freight?

A. I didn't hear you.

Q. You mean if Dant & Russell would have absorbed the increase in freight, you would have shipped?

A. You would have to go into a lot of history in connection with those Oriental shipments.

Q. Well, we don't need to go into any history. I am just [144] asking you. You said that the reason you shipped those at the old contract price, referring now to the Hong Kong lumber, was because you did it at no additional cost to yourselves by way of freight. That is true, isn't it?

A. I said that there was no — that they were shipped at no additional cost to ourselves.

Q. Now I ask you, would you have shipped them had there been an additional cost to you?

A. Under certain conditions. I don't know. There was no additional cost to us, and I could not say.

Q. Would you have shipped them had there been an additional cost to you?

Mr. Schweppe: I think that is calling for an opinion.

(Testimony of William J. Young.)

The Court: If he knows, why he can answer.

A. I don't know.

Q. You don't know? A. No.

Q. You know that you did ship 4609 number 4 at an increased cost, do you not? A. Yes.

Mr. McCurtain: That is all.

The Witness: That was not a Hong Kong order.

Redirect Examination

By Mr. Schweppe:

Q. Mr. Young, will you, just for the advice of the court, state the difference in your conception between orders destined for Hong Kong and destined for Shanghai?

A. The Hong Kong market, the space to the Hong Kong market is controlled by the Pacific Westbound Conference, and [145] all shipments made to Hong Kong must go on Conference line vessels, and it is under a contract signed with the Conference that shipments are made. The volume to Hong Kong is insignificant as far as Oriental shipments go, and the conditions applying to Hong Kong are not the conditions that would apply to Shanghai or other north China or Japanese markets.

Q. In what respect do the shipping conditions to Shanghai and other Japanese markets differ?

A. The rates are open, or covered by a gentlemen's agreement among the Conference Lines. Charters can go in there. A vessel may be chartered

(Testimony of William J. Young.)

for operation in those markets, and the volume is tremendous as compared with Hong Kong.

Q. When you speak of the Conference, for the purpose of the record and the information of counsel and the court, will you state what that means?

A. The Pacific Westbound Conference is an association of lines under the Shipping Act of 1916, whereby they are relieved of certain stipulations of the anti-trust laws, and can fix rates and regulations for the operating conditions in that trade only.

Q. After the strike was over on February 5, was it possible to get any space out of Willapa Harbor?

A. Not for us.

Q. Destined for Shanghai? A. Not for us.

Q. I will refer you to contract number 4609, to which counsel just referred, 4609, number 4, being 500,000 feet destined for Shanghai, shipment to be made in February. Counsel asked you whether or not that was not done at increased [146] cost. I will ask you whether this Exhibit 6, to which counsel just referred, is not the contract that was still in force under its original contract period of shipment at the time the strike terminated?

A. Yes, sir. It was in force.

Q. And the reason you carried that one out is because you were obligated to do so under the original terms? A. Yes, sir.

Mr. Schweppe: I think that is all, Mr. Young.

(Testimony of William J. Young.)

Recross Examination

By Mr. McCurtain:

Q. Do you understand that the contract last referred to was in force because the thirty days had not expired since the cessation of the strike?

A. No, sir; because at that time—Mr. Schweppe asked me if it was not in force at the time the strike terminated.

Q. You consider that was in force at the time the strike terminated? A. Yes, sir.

Q. And that you only had four days gone during that month? A. Five days.

Mr. McCurtain: That is all.

Mr. Schweppe: That is all, Mr. Young.

(Witness excused.)

Mr. Schweppe: Mr. Herber, please. [147]

J. P. HERBER,

recalled as a witness on behalf of the defendant, being previously sworn, testified as follows:

Direct Examination

By Mr. Schweppe:

Q. Mr. Herber, you heard Mr. Connolly testify that at the meeting of shippers on or about January 4, you made certain statements at the meeting to the tenor and effect that you were bound to ship, and therefore wanted the steamship companies to make

(Testimony of J. P. Herber.)

good on their commitments. Will you state your version of what you said at that meeting? Did you make the statement that you wanted the steamship companies to reinstate because you were bound to ship under your contracts? A. I did not.

Q. Will you tell the court what statement you did make?

A. I explained, not once, but several times to the exporters, that we were protected on our contracts; and my only interest in the conference was to help the other exporters secure a fair deal from the steamship companies.

Q. And just one more question; does the Grays Harbor Exportation Company sell direct to the Orient? A. We do not.

Q. To whom do you sell?

A. We sell to the exporters on this side.

Q. The Grays Harbor Exportation Company is a representative of how many mills?

A. Sixteen mills.

Q. Located where?

A. Grays and Willapa Harbors.

Q. And the people to whom you sell are lumber shippers [148] located where, or lumber exporters?

A. In Seattle, Tacoma, Portland and Vancouver.

Mr. Schweppe: That is all, Mr. Herber.

Mr. McCurtain: That is all.

(Witness excused.)

Mr. Schweppe: The defendant rests.

Mr. McCurtain: I would like, Your Honor, to ask Mr. Connolly just one question. I think he can answer it from where he is.

The Court: On rebuttal?

Mr. McCurtain: Yes.

JOE J. CONNOLLY,

recalled as a witness on behalf of the plaintiff in rebuttal, being previously duly sworn, testified as follows:

Direct Examination

By Mr. McCurtain:

Q. You heard Mr. Young's statement, Mr. Connolly, to the effect that on the 23rd of February, 1937, he asked you whether Dant & Russell would consent to reinstatement of the Hong Kong contract? A. I heard that, yes.

Q. Was any such statement ever made to you by him?

A. Definitely not. Any discussion was along the same lines as the letter he wrote confirming the discussion, that he had advised me that it was going on that boat, and he confirmed it the next day in almost identical language by letter.

Q. There was no such statement as he has testified to asking whether you would accept?

A. No. [149]

Mr. McCurtain: That is all.

Mr. Schweppe: That is all.

(Witness excused.)

Mr. McCurtain: That is our case, Your Honor. I would like to suggest to Your Honor that my client considers this case of grave importance, not so much for the amount of money involved, but for a principle which we think ought to be established by the trial of this case; and that inasmuch as we are going to have, by previous arrangement, a transcript of the entire proceeding, with which Your Honor will be furnished of course the original and counsel a copy, that we brief this case again, if Your Honor will thus be imposed upon, and that after we have briefed it we then fix, if Your Honor will permit, a day for oral argument after we have the record before us; or if Your Honor prefers no oral argument, we would be satisfied to submit it without argument on brief.

The Court: I have no objection to oral argument. It is very much like any situation, though, gentlemen; one side has got to lose, and the side that loses usually is not satisfied with it; and the quicker you get over the circumstance of losing and winning, the better it is for both sides.

(Discussion with regard to time of argument.)

The Court: The court fixes the time of the argument as November 1, when the court's business with reference to the closing of the old term and the opening of the new is finished on that day. You gentlemen get in your briefs as soon as you can.

[150]

Mr. Schweppe: We shall.

(Whereupon the case was adjourned until 10:00 o'clock A. M. on Tuesday, November 1, 1938, at which time proceedings were resumed as follows:) [151]

[Title of District Court and Cause.]

DECISION AFTER TRIAL

Bayley & Croson, Seattle, Washington,
Allen H. McCurtain, Portland, Oregon,
Attorneys for Plaintiff.

McMicken, Rupp & Schweppe, Seattle, Washington,
J. Gordon Gose, Seattle, Washington,
Attorneys for Defendant.

This action tried by the court without a jury was brought by the buyer against the seller to recover damages for breach of contract for the sale, shipment and delivery of about 3,200,000 feet of Pacific Hemlock logs for export to China. The several contracts involved called for shipment in October, October/November, November/December, December, January and February. Plaintiff buyer's complaint alleges that part only of the logs called for by the contracts were delivered and that after demand upon defendant seller for delivery of the remainder of the contracted logs plaintiff was compelled to purchase such remainder elsewhere, to plaintiff's total damage in the sum of $17,272.17, for which plaintiff seeks judgment against defendant.

Defendant seller pleads, among other things, nonliability by reason of a strike of longshoremen which prevented defendant from making the required shipment and delivery during the delivery months [152] provided for in the contracts, and by reason of the contract exemption from liability for nonshipment and nondelivery occasioned by strikes. Plaintiff, however, contends that under the law and a custom applicable to the contracts and under a practical construction of the contracts made by the defendant, the latter was obligated to perform the contracts during a reasonable time after the cessation of the strike. Whether defendant was so obligated is the question for decision, which depends primarily upon the construction of the contract provisions.

Bowen, District Judge:

The contracts all contain a strike clause providing that " * * * the seller is not liable for delay or nonshipment or for delay or nondelivery if occasioned by * * * strikes, lockouts, or labor disturbances * * *." But the seller is given an option to make delayed delivery by the following contract provision: "Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned causes, if so required by the seller, provided the delay does not exceed thirty days."

The contracts also contain the following language: "The terms of this contract are herein stated in their entirety, and it is understood that

there is no verbal contract or understanding governing it."

This court is not advised of any controlling Washington state authority upon the proper construction of these particular contract provisions.

In the case of Normandie Shirt Co. v. J. H. & C. K. Eagle, 144 N. E. 507 (N. Y.), a contract for the sale of shirting called for "delivery June-July-Aug.-Sept." and contained a strike clause providing that * * * strikes * * * prevent- [153] ing the delivery of merchandise in accordance with the terms of this contract shall absolve the seller from any liability hereunder." And the New York court held that a strike preventing delivery during the months specified absolved the seller not only from liability for delay but also "from any liability," which would include liability for failure to deliver at all.

Concerning contracts like that involved in that case absolving the seller from any liability for failure to deliver due to frustration of the contract by labor strikes, the New York court (at pp. 510-511 of 144 N. E.) said:

> "When deliveries according to contract have been prevented, by strikes of a substantial nature, or other like excepted causes, the party is relieved altogether, not only from liability for failure to make such deliveries, but also from the obligation to make them thereafter. As to the installments not delivered according to contract, the contract is terminated. Whether this termination would extend to separable install-

ments falling due after the strike, which it would then be within the capacity of the seller to deliver within the contract term, we do not need to consider. At least as to the installments falling due within the period of disability, the obligation would be ended. As to such installments, if it be the intention of the parties that the strike clause is merely to delay delivery, so that goods which could not be made or delivered because of a strike must be subsequently made or delivered within a reasonable time thereafter, the contract must clearly so provide (Citing cases) * * *

The cases referred to by the respondent will be found to have clauses in the contracts involved clearly indicating that delivery was to be delayed, and made up subsequently to the termination of the cause of delay. We conclude, therefore, that this clause entitled the defendant to terminate the contract on September 30th, and to refuse to deliver any goods thereunder of which delivery has been prevented by strikes. In other words, it could not deliver by September 30th, the goods which the plaintiff had ordered, by reason of the strike. The contract as to these undeliverable goods was therefore at an end, and the defendant was not obliged to make them up and to deliver them later. This clause did not call for a later or postponed delivery."

To the same effect are the following cases involving various force majeure clauses: Black & Yates v. Negros-Philippine Lumber Co., 231 Pac. 398 (Wyo.); Kunglig [154] Jarnvagsstyrelsen v. National City Bank, 20 F.(2d) 307; Atlantic Steel Co. v. R. C. Campbell Coal Co., 262 Fed. 555; Edward Maurer Co. v. Tubeless Tire Co., 285 Fed. 713; Indiana Flooring Co. v. Grand Rapids Trust Co., 20 F.(2d) 63.

Under similar circumstances, and in the absence of a contract option to the seller to make later delivery, the buyer likewise is absolved from any liability to take delivery after expiration of the contract period of delivery. General Commercial Co. v. Butterworth-Judson Corp., 191 N. Y. S. 64; Haskins Trading Co. vs. S. Pfeifer & Co., 130 So. 469 (La.).

Does the liability exemption provision of the contracts in suit absolve the defendant seller from liability to deliver after the contract delivery period? The language of the contracts in question here is: "* * * the seller is not liable for delay or nonshipment or for delay or nondelivery if occasioned by * * * strikes * * *." It is to be noted in this strike clause that the word delay occurs in connection with the statement of nonliability for both nonshipment and nondelivery, and further that the seller is not to be liable for nondelivery as well as nonshipment. The provision as to delay, however, is not that the seller is not to be liable for delay *in**

*Italics in this decision are by the court.

shipment nor for delay *in* delivery, and is not confined to delay alone, but the provision is that the seller is not liable for delay *or* nonshipment *or nondelivery*. Obviously these words are not synonymous, and by the use of the word "nondelivery" some meaning in addition to that meant by "nonshipment" must have been intended. As no sale can be completed without delivery, conditionally absolving the seller from liability for nondelivery in a sales contract is equivalent to freeing the seller of his obligation to perform the sales contract when the nonliability-for-nondelivery condition [155] happens. When applied to the question of this defendant seller's liability, there is no substantial difference in meaning between the phrase " * * * the seller is not liable for * * * nondelivery if occasioned by * * * strikes * * * as used in the contracts in suit," and the phrase " * * * strikes * * * preventing the delivery of merchandise in accordance with the terms of this contract shall absolve the seller from any liability hereunder" as used in the contract involved in the Normandie Shirt Co. case, supra.

The provisions for the contract delivery periods in the Normandie Shirt Co. case and in this case are similar, and those provisions are not ambiguous nor uncertain in either case. If the seller was not, under the strike clause absolving "the seller from any liability" in the Normandie Shirt Co. case, obligated

to make delivery during a reasonable time after the cessation of the strike, then as regards the portion of the contract period which expired during the strike the defendant seller in this case is not obligated for a reasonable time or any time after the strike to make delivery, because excused therefrom under the strike clause here providing that "* * * the seller is not liable for * * * nondelivery if occasioned by * * * strikes, lockouts or labor disturbances * * *." Defendant is not, therefore, obligated under the contract provisions here to deliver after the strike any of the logs which according to the contracts should have but for the strike been delivered during it. The proof does not show that the strike period ended before the expiration of the contract delivery period, and the court understands any contention about that raised by the pleadings was abandoned at the trial. [156]

Plaintiff's contention that by a custom pertaining to the trade defendant is obligated for a reasonable time after the termination of the strike to make delivery is not tenable, because the contract terms above noticed relating to time of delivery and the effect of the strike clause thereon are so clear and unmistakable on the point affected by the alleged custom that to apply the custom, if one existed, would obviously violate the express agreement of the parties relating to nonliability of the seller for nondelivery. Under the law, custom cannot be employed to produce that effect, nor at all where, as here, there is no ambiguity or uncertainty

as to the provisions or meaning of the contract sought to be explained by the alleged custom. In this case custom is at least impliedly, if not expressly, excluded by the terms of the contracts themselves. Thus one of the necessary conditions for permissible application of custom is lacking. 17 C. J. 508 (Sec. 77); Keen v. Swanson, 129 Wash. 269; Moore v. United States, 196 U. S. 157; The Albisola, 6 F. Supp. 392.

In this connection, however, the court is not convinced that the proof is sufficient to establish the custom relied upon by plaintiff even if proper proof of it would do no violence to the terms of these contracts. Two of the officials of plaintiff company testified in effect to the existence of a custom calling for delivery within a reasonable time after the strike, but two of the defendant's officers or agents denied any knowledge of such a custom. Other witnesses were not in entire accord as to the existence of such a custom nor as to certainly what it was. There is here no convincing evidence free from ambiguity, uncertainty or variability establishing a uniformly prevalent and universally observed custom calling for delivery within a reasonable or [157] certain time after the expiration of the contract period or the strike impediment, as is required by such authorities as Washington Brick, Lime & Sewer Pipe Co. v. Anderson, 176 Wash. 416.

Plaintiff further contends that, by performing other similar contracts (some with plaintiff and some with third parties) and by a course of inaction

as to the contracts in suit, defendant has placed a practical construction on and has recognized the binding effect of these contracts as contended for by plaintiff. But on this phase of the case the proof again does not convincingly support plaintiff's contention. The evidence on this point is not free of conflict, and all of it is of a very general nature, but such as there is leads to the conclusion that the attending circumstances were, in the case of the other performed contracts, different from the circumstances which would have attended performance by defendant of the contracts in suit, unsettled freight rates following the strike and the fact that the freight rates actually paid by plaintiff in substitute performance and included in plaintiff's alleged damage were higher than those applicable before the strike are examples of such different attending circumstances. Likewise, the court is not convinced that defendant's course of inaction respecting performance of the contracts now in question was of such character as to indicate that defendant before suit placed on the contracts a construction different from that so placed by it after suit, especially in view of the contract option to the defendant seller to make delayed delivery within thirty days after the strike.

Regardless of the effect of the evidence just noted, this issue on the asserted applicability of the rule of practical construction may be disposed of by a consideration [158] of the law and the controlling evidence concerning that issue. The proper

application of that rule presupposes the existence of two necessary conditions, namely, ambiguous or uncertain contract provisions, and a long course of explanatory conduct thereunder by the parties. Lowrey v. Hawaii, 206 U. S. 206; Insurance Co. v. Dutcher, 95 U. S. 269. But here those conditions are not present. The contract provisions in question, as above pointed out, are not ambiguous or uncertain; and the conduct of defendant respecting other contract performance advanced by plaintiff to aid construction of those provisions was not a long course of conduct, but was with reference to certain contracts performed by defendant within and during a relatively short period after the same strike which is involved in this case. Defendant's course of inaction as to the contracts in suit was for about the same period or less, during which time as to which contracts defendant did nothing and acquiesced in nothing done by plaintiff inconsistent with defendant's delivery delay option or present position. Under that option defendant had the privilege for thirty days after the strike to deliver or not as it saw fit, without incurring liability for the consequences of not, during the life of the option, disavowing intention to exercise it. In that, there is no basis for estoppel by inconsistent conduct.

This case, therefore, is not one for the proper application of the rule of practical construction of contract by the conduct of the parties. Amherst Inv. Co. v. Meacham, 69 Wash. 284; Lesamis v.

Greenberg, 225 Fed. 449; Brown & Sons Lumber Co. v. L. & N. R. R. Co., 82 F.(2d) 94; In re Chicago & E. I. Ry. Co., 94 F.(2d) 297. [159]

The decision of this court is that plaintiff take nothing by its complaint and that the action be dismissed, with costs to defendant. Findings, conclusions and judgment may be settled upon notice or stipulation.

JOHN C. BOWEN,
United States District Judge.

[Endorsed]: Filed Feb. 8, 1939. [160]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause having come on for trial on the 4th day of October, 1938, before the above entitled court sitting without a jury, and the plaintiff appearing by Bayley & Croson and Allen H. McCurtain, its attorneys, and the defendant appearing by McMicken, Rupp & Schweppe and J. Gordon Gose, its attorneys, and evidence having been introduced on behalf of both plaintiff and defendant, and both parties having rested, and the Court having thereafter filed its written decision in favor of the defendant and against the plaintiff, Now Therefore, the Court does hereby make and enter the following Findings of Fact:

I.

The plaintiff is now, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, having its principal office and place of business in the State of Oregon, and having for its principal business the purchase and sale, for export, of lumber and lumber products. [161]

II.

The defendant is now and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Washington, having its principal office and place of business at Aberdeen, Washington.

III.

On or about September 1, 1936, the plaintiff and the defendant entered into a written contract dated September 1, 1936, under the terms of which the plaintiff agreed to buy from the defendant, and the defendant agreed to sell to the plaintiff, 500,000 feet, board measure, Brereton Scale, 10% more or less, at seller's option, Pacific Hemlock logs of Camp Run Export Grades, at a price of $14.25 per M. feet, including freight charge to point of destination, for shipment during the month of October, 1936, from Grays Harbor and/or Willapa Harbor in the State of Washington, at seller's option, to Tsingtau, China, which written contract was admitted in evidence as part of plaintiff's Exhibit 1

on the trial of this cause and bears Seller's No. S4545 Amended, and Buyer's No. CX-532.

IV.

On or about October 28, 1936, the defendant shipped and delivered, 249,141 feet of the logs covered by said contract, for which plaintiff paid the defendant. On October 29, 1936, a strike of longshoremen commenced in all seaports of the Pacific Coast of the United States of America, and continued without interruption up to and including February 5, 1937, and that during the period while said strike was in effect it was impossible for the defendant to make, or for the plaintiff to accept shipment or [162] delivery of any of the remaining logs which, according to the terms of said contract were to be sold. Following the cessation of said strike, the plaintiff demanded that defendant make shipment and delivery of the quantity of logs which had not been shipped and delivered under said contract, but the defendant then refused to make such shipment or delivery. The defendant did, however, on or about April 2, 1937, offer to enter into a new contract to sell, ship and deliver to plaintiff, at a price of $16.75 per M. board feet, logs of the same quantity and quality as those which were not shipped or delivered under the contract dated September 1, 1936, and plaintiff accepted this offer upon the condition that in so doing, any rights of either party under the contract dated September 1, 1936, should not be in any way prejudiced or im-

paired. Accordingly, a new written contract subject to the terms of such offer and acceptance, was entered into by plaintiff and defendant on or about April 6, 1937, which new written contract was dated April 6, 1937, and was admitted in evidence on the trial of this cause as a part of plaintiff's Exhibit 1. In complete performance of this new contract, defendant shipped and delivered to the plaintiff 253,751 feet, Brereton Scale, of logs, for which plaintiff paid defendant at the rate of $16.75 per M. feet, and in so doing plaintiff paid $634.38 more than it would have been obligated to pay for such logs under the terms of the original contract dated September 1, 1936.

V.

On or about September 4, 1936, the plaintiff and defendant entered into a written contract dated September 4, 1936, under the terms of which the plaintiff agreed to buy from the defendant, and the defendant agreed to sell to the [163] plaintiff, 1,000,000 feet, board measure, Brereton Scale, 10% more or less, at seller's option, Pacific Hemlock logs of Camp Run Export Grades, at a price of $13.75 per M. feet, including freight charge to point of destination, for shipment 500,000 feet, October/November, 1936, at seller's option, and 500,000 feet, November/December, 1936, at seller's option, from Grays Harbor and/or Willapa Harbor in the State of Washington, at seller's option, to Shanghai, China, which written contract was admitted in evidence as plaintiff's Exhibit 2 on the trial of this

cause, and bears Seller's No. S4566, and Buyer's No. CX-510.

VI.

On or about October 5, 1936, defendant shipped and delivered 502,635 feet of the logs covered by said contract, for which plaintiff paid the defendant. During the period while the strike of longshoremen, hereinbefore mentioned, was in effect, that is, from October 29, 1936, to February 5, 1937, it was impossible for the defendant to make, or for the plaintiff to accept shipment or delivery of any of the remaining logs which, according to the terms of said contract dated September 4, 1936, were to be sold. Following the cessation of said strike, the plaintiff demanded that defendant make shipment and delivery of the quantity of logs which had not been shipped and delivered under said contract, but the defendant then refused to make such shipment or delivery.

VII.

Following such refusal of the defendant to make further deliveries under the said contract bearing date of September 4, 1936, plaintiff purchased in the open market, and at the best price obtainable, 430,084 feet, Brereton Scale, of logs [164] of the kind and quality covered by said contract, at a cost which was $5,376.05 in excess of the amount which plaintiff would have had to pay to defendant for such logs according to the terms of said contract.

VIII.

On or about September 28, 1936, the plaintiff and defendant entered into four written contracts dated September 28, 1936, under the terms of which the plaintiff agreed to buy from the defendant, and the defendant agreed to sell to the plaintiff 1,700,000 feet, board measure, Brereton Scale, 10% more or less, at seller's option, Pacific Hemlock Logs, of Camp Run Export Grades, at a price of $14.00 per M. feet, including freight charge to point of destination, for shipment 200,000 feet October/November, 1936, at seller's option, 500,000 feet December, 1936, 500,000 feet January, 1937, and 500,000 feet February, 1937, from Grays Harbor and/or Willapa Harbor in the State of Washington at seller's option, to Shanghai, China, which written contracts were admitted in evidence as plaintiff's Exhibits 3, 4, 5 and 6 respectively on the trial of this cause, and bear Seller's Nos. S4609#1, S4609#2, S4609#3, and S4609#4, and Buyer's Nos. CX-550, CX-547, CX-548 and CX-549 respectively.

IX.

On or about October 28, 1936, defendant shipped and delivered 170,384 feet of the logs covered by said contracts, and on or about March 4, 1937, shipped and delivered 494,176 feet of the logs covered by said contracts, or a total of 664,560 feet, for which plaintiff paid the defendant. During the period while the strike of longshoremen, hereinbefore mentioned, was in effect, that is, from October

29, 1936, to February 5, 1937, it was impossible for the defendant to [165] make, or for the plaintiff to accept shipment or delivery of any of the remaining logs which, according to the terms of said contracts dated September 28, 1936, were to be sold. Following the cessation of said strike, the plaintiff demanded that defendant make shipment and delivery of the quantity of logs which had not been shipped and delivered under said contract, but the defendant then refused to make such shipment or delivery, except the said shipment and delivery made on March 4, 1937, in performance of its agreement under said contracts to deliver half a million feet, 10% more or less, during February, 1937.

X.

Following such refusal of the defendant to make further deliveries under the said contracts bearing date of September 28, 1936, plaintiff purchased in the open market, and at the best price obtainable, 919,325 feet, Brereton Scale, of logs of the kind and quality covered by said contracts, at a cost which was $11,261.74 in excess of the amount which plaintiff would have had to pay to defendant for such logs according to the terms of said contracts.

XI.

All of the contracts sued upon contain the following terms and provisions.

> "Delivery and/or shipment of material under this contract is subject to acts, requests or com-

mands of the Government of the United States of America and all rules and regulations pursuant thereto adopted or approved by the said Government, and the seller is not liable for delay or nonshipment or for delay or nondelivery if occasioned by acts of God, war, civil commotions, destruction of mill if named, fire, earthquakes, epidemics, diseases, restraint of princes, floods, snow, storms, fog, drought strikes, lockouts, or labor disturbances, quarantine, or nonarrival at its due date at loading port of any ship named by the seller, or from any other cause whatsoever, whether or not before [166] enumerated, beyond the seller's control, or for any loss or damage caused by perils usually covered by insurance or excepted in bills of lading, or for outturn. Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned causes, if so required by the seller, provided the delay does not exceed thirty days. The conditions of usual charter party and/or bills of lading are hereby accepted by the buyer's and the same are hereby made a part of this contract, save that said conditions shall not limit the exceptions above enumerated.

"Upon delivery of the goods to vessel all obligations of the seller hereunder shall cease and terminate, it being understood that thereafter the goods are for the account and risk of the buyers.

"In the event of war affecting this contract, the seller has the right of cancellation or charging to the buyers the extra premium for insurance against war risk. Buyers may at any time instruct that seller place war risk insurance, the cost of which is to be for buyer's account, if it can be obtained.

"The terms of this contract are herein stated in their entirety, and it is understood that there is no verbal contract or understanding governing it.

"This contract is to be governed by the laws of the State of Washington, U. S. A., so far as applicable, and otherwise by the laws of the United States of America."

XII.

All of the contracts sued upon embody the complete and final agreements of the parties and there are no collateral or oral agreements, either antecedent or subsequent, which in any way vary the terms of said written contracts.

XIII.

No trade custom or usage exists which is contrary to the provisions of said agreements or affects the interpretation of any part thereof, or which can be applied to vary or add to the terms of said written contracts, or which required the defendant to ship or deliver any logs after the time specified in said written contracts for shipment or delivery thereof had expired. [167]

XIV.

Neither the defendant alone, nor the defendant and plaintiff together, ever placed any practical construction upon any of the said contracts which would require the defendant to ship or deliver any logs after the time specified in said contracts for shipment or delivery thereof had expired.

Done in open court this 2nd day of March, 1939.

JOHN C. BOWEN,
Judge.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

I.

The strike of longshoremen which commenced on October 29, 1936, and continued without interruption until February 5, 1937, was a strike of the character contemplated by the terms of each and all of the contracts sued upon herein, and permanently excused non-performance thereof by the defendant, as to all logs which by the terms of any of said contracts were to be shipped or delivered during the period while said strike was in effect.

II.

Upon the cessation of said strike of longshoremen, the defendant was under no obligation to sell, ship or deliver to plaintiff any logs which, under the terms of said contracts or any of them, were to be shipped or delivered during the months of Octo-

ber, November and December, 1936, and January, 1937. [168]

III.

Judgment should be entered herein denying relief to plaintiff and granting judgment in favor of defendant for its costs and disbursements to be taxed herein.

Done in open court this 2nd day of March, 1939.

JOHN C. BOWEN,
Judge.

Presented by:
J. GORDON GOSE.

Approved as to form.
BAYLEY & CROSON.

[Endorsed]: Filed Mar. 2, 1939. [169]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 21137.

DANT & RUSSELL, INC., a corporation,
Plaintiff,

vs.

GRAYS HARBOR EXPORTATION COMPANY, INC., a corporation,
Defendant.

JUDGMENT

The above entitled cause having come on for trial on the 4th day of October, 1938, before the above

entitled court sitting without a jury, and the plaintiff appearing by Bayley & Croson and Allen H. McCurtain, its attorneys, and the defendant appearing by McMicken, Rupp & Schweppe and J. Gordon Gose, its attorneys, and evidence having been introduced on behalf of both plaintiff and defendant, and both parties having rested, and the Court having thereafter filed its written decision in favor of defendant and against the plaintiff, and having made and entered Findings of Fact and Conclusions of Law, Now Therefore, in conformity with said Findings of Fact and Conclusions of Law, It Is Hereby Ordered and Adjudged that plaintiff take nothing by reason of its complaint herein, and that said complaint be and the same hereby is dismissed, and that the defendant have and recover judgment against plaintiff for its costs and disbursements herein in the sum of $125.02.

Done in open court this 2nd day of March, 1939.

JOHN C. BOWEN,
Judge.

Presented by:
J. GORDON GOSE.

Approved as to form.
BAYLEY & CROSON.

[Endorsed]: Filed Mar. 2, 1939. [169½]

[Title of District Court and Cause.]

EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

Comes now Dant & Russell, Inc., plaintiff in the above entitled action, appearing by Bayley & Croson and Allen H. McCurtain, its attorneys, and excepts to the Findings of Fact made and entered by the Court herein as follows:

I.

Excepts to Paragraphs XII, XIII, and XIV of said Findings of Fact on the ground and for the reason that said Findings of Fact are not supported by the evidence before the Court.

And said plaintiff further excepts to the Conclusions of Law made and entered by the Court as follows:

I.

Excepts to Paragraphs I, II and III thereof on the ground and for the reason that said Conclusions of Law are not supported by the evidence in the above entitled cause and the law applicable thereto.

And said plaintiff further excepts to the Judgment of the Court entered herein on the ground and for the reason that said Judgment is not supported by the evidence and the law applicable thereto.

[170]

BAYLEY & CROSON
ALLEN H. McCURTAIN

Foregoing exceptions allowed this 2nd day of March, 1939.

JOHN C. BOWEN,
Judge.

Presented by:
FRANK S. BAYLEY, JR.

[Endorsed]: Filed Mar. 2, 1939. [171]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Dant & Russell, Inc., a corporation, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on the 2nd day of March, 1939.

Dated this 24th day of April, 1939.

BAYLEY & CROSON,
ALLEN H. McCURTAIN,
Attorneys for Appellants,
Dant & Russell, Inc.

Address: 900 Insurance Building,
Seattle, Washington.

[Endorsed]: Filed Apr. 24, 1939. [201]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That we, Dant & Russell, Inc., as Principal, and United Pacific Insurance Company, as Surety, acknowledge ourselves to be jointly indebted to Grays

Harbor Exportation Company, appellee in the above cause, in the sum of Two Hundred Fifty and No/100 ($250.00) Dollars, conditioned that, Whereas, on the 2nd day of March, A. D. 1939, in the District Court of the United States for the Western District of Washington, in a suit depending in that court, wherein Dant & Russell, Inc., was plaintiff and Grays Harbor Exportation Company, Inc., was defendant numbered on the Civil Docket as No. 21137, a judgment was rendered against the said plaintiff and the said plaintiff having filed in the office of the Clerk of the said District Court a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, in the State of California, on the ..... day of ....., A. D. 1939, next.

Now the Condition of the Above Obligation Is Such, that if the said plaintiff shall prosecute its appeal to effect and answer all costs, if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified, then the above obligation is void, else to remain in full force and effect.

[Seal] DANT & RUSSELL, INC.,
By R. J. DARLING,
Principal, Vice Pres.,
UNITED PACIFIC
INSURANC COMPANY.
By: JOE PRICE,
JOE PRICE,
Attorney-in-fact.

Bond Book Vol. 4, page 55.

[Endorsed]: Filed Apr. 24, 1939. [202]

[Title of District Court and Cause.]

STIPULATION AS TO THE CONTENTS OF TRANSCRIPT OF RECORD

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the transcript of record to be filed in the Circuit Court of Appeals for the Ninth Circuit, pursuant to the appeal taken herein, shall include the following:

1. Complaint at Law, except exhibits attached thereto;
2. Answer.
3. Demurrer;
4. Order Overruling Demurrer;
5. Reply to First Affirmative Defense;
6. Transcript of Testimony;
7. Decision After Trial;
8. Findings of Fact and Conclusions of Law;
9. Judgment;
10. Exceptions to Findings of Fact and Conclusions of Law and Judgment;
11. Part of Plaintiff's Exhibit I, being contracts dated September 1, 1936 and April 6, 1937;
12. Plaintiff's Exhibit XI; [203]
13. Part of Plaintiff's Exhibit XII, being Paragraph "L", entitled "General Conditions" of contract form of Douglas Fir Exploitation and Export Company;
14. Notice of Appeal, filed April 24, 1939;

15. Stipulation as to Contents of Transcript of Record;

16. Bond;

Dated this 15th day of May, 1939.

BAYLEY & CROSON,
ALLEN H. McCURTAIN,
Attorneys for Complainant.
McMICKEN, RUPP & SCHWEPPE,
Attorneys for Defendant.

[Endorsed]: Filed May 16, 1939. [204]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Elmer Dover, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 204, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by stipulation of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitute the

record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 545 folios at .05¢	$27.25
Appeal fee (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Record	.50
TOTAL:	$32.75

I hereby certify that the above cost for preparing and certifying record, amounting to $32.75 has been paid to me by the attorneys for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 29th day of May, 1939.

[Seal] ELMER DOVER,
Clerk of the United States District Court for the Western District of Washington.
By: ELMO BELL,
Deputy.

[Endorsed]: No. 9196. United States Circuit Court of Appeals for the Ninth Circuit. Dant & Russell, Inc., a Corporation, Appellant, vs. Grays Harbor Exportation Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed, May 31, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

..... Term

No. 9196.

DANT & RUSSELL, INC., a corporation,
Appellant,

vs.

GRAYS HARBOR EXPORTATION COMPANY, a corporation,
Appellee.

APPELLANT'S STATEMENTS OF POINTS UPON WHICH IT INTENDS TO RELY

Comes now the appellant herein, Dant & Russell, Inc., and states that the points upon which it intends to rely in this court and case, are as follows:

I.

The contracts sued on, by their terms, bound the appellee (seller) to ship, and the appellant (buyer) to accept, the merchandise contracted for, at the price and on the terms stated, and in the event of a delay in, or failure of, shipment occasioned by any of the causes enumerated in the contracts other than war, bound each party to performance within a reasonable time after the cause of delay was removed, unless the delay, caused by the impediment, was of unreasonable duration.

II.

Unless it be held that the contracts sued upon, intentionally exclude the usages and customs of the trade, with regard to the effect of contemplated impediments to performance, such usages and customs are necessary to their interpretation, and the court should have permitted evidence thereof to be received.

Respectfully submitted,
BAYLEY & CROSON,
ALLEN H. McCURTAIN,
Attorneys for Appellant.

Copy received 5/18/39.
McMICKEN, RUPP &
SCHWEPPE,
Attorneys for Appellee.

[Endorsed]: Filed May 31, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AS TO DESIGNATION OF THE PARTS OF RECORD NECESSARY TO A CONSIDERATION OF POINTS ON APPEAL.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the entire record as filed herein is necessary for the consideration of the above appeal.

Dated this 18 day of May, 1939.

BAYLEY & CROSON,
ALLEN H. McCURTAIN,
Attorneys for Appellant.
McMICKEN, RUPP & SCHWEPPE,
Attorneys for Appellee.

[Endorsed]: Filed May 31, 1939. Paul P. O'Brien, Clerk.